

CLERK'S COPY.

TRANSCRIPT OF RECORD

---

Supreme Court of the United States

OCTOBER TERM, 1938

No. 244

---

CHIPPEWA INDIANS OF MINNESOTA, APPELLANT,

vs.

THE UNITED STATES

---

APPEAL FROM THE COURT OF CLAIMS

---

FILED AUGUST 2, 1938.





# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

No. 244

CHIPPEWA INDIANS OF MINNESOTA, APPELLANT,

vs.

THE UNITED STATES

APPEAL FROM THE COURT OF CLAIMS

## INDEX

	Original	Print
Record from Court of Claims.....	1	1
History of proceedings .....	1	1
Amended petition .....	1	1
General traverse .....	13	10
History of proceedings.....	14	10
Argument and submission.....	14	10
Further proceedings in case.....	14	11
Order on motions for new trial.....	15	11
Special findings of fact.....	16	12
Conclusion of law.....	42	36
Opinion of the court, Williams, J.....	42	36
Judgment .....	55	48
Amendment to original jurisdictional act.....	56	49
Plaintiff's petition for appeal and allowance of same....	57	50
Citation and service..... (omitted in printing) ..	60	
Clerk's certificate..... (omitted in printing) ..	61	
Statement of points to be relied upon and designation as to printing record .....	62	52

JUDG & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 17, 1938.



[fol. 1]

# IN COURT OF CLAIMS OF THE UNITED STATES

No. H-192

CHIPPEWA INDIANS OF MINNESOTA,

v.

THE UNITED STATES

## I. HISTORY OF PROCEEDINGS

On May 5, 1927, the plaintiffs filed their original petition.

On June 14, 1927, the defendant filed a general traverse to said petition.

On August 22, 1935, by leave of court, the plaintiffs filed an amended petition, which is as follows:

## II. AMENDED PETITION—Filed August 22, 1935

Plaintiffs, the Chippewa Indians of Minnesota, respectfully show to the court:

1. This suit is brought pursuant to the Act approved May 14, 1926 (44 Stat. 555) as amended by Acts approved April 11, 1928 (45 Stat. 483) and June 18, 1934 (48 Stat. 979) which provides in part as follows:

"Sec. 1. That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party as in other cases, notwithstanding the lapse of time or statute of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising [fol. 2] under or growing out of the Act of January 14, 1889 (25 Stat. L. 642), or arising under or growing out of any subsequent Act of Congress in relation to Indian Affairs which said Chippewa Indians of Minnesota may have against the United States, which claims have not heretofore been determined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States. In any such suit or suits the plaintiffs, the Chippewa Indians of

Minnesota, shall be considered as including and representing all those entitled to share in the final distribution of the permanent fund provided for by section 7 of the Act of January 14, 1889 (25 Stat. L. 642), and the agreements entered into thereunder: \* \* \*

"Sec. 3. In said suit or suits the court shall also hear, examine, consider, and adjudicate any claim which the United States may have against the said Chippewa Indians, and any payment or payments which may have been made by the United States upon any claim against the United States by said Indians shall not operate as an estoppel, but may be pleaded as an offset in such suit or suits as may gratitudes, if any, paid to or expended for said Indians subsequent to January 14, 1889."

"Sec. 4. If it be determined by the court that the United States, in violation of the terms and provisions of any law, treaty, or agreement as provided in section 1 hereof, has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal, together with interest at 5 per centum per annum from the date thereof; and with reference to all claims which may be the subject matter of the suits herein authorized, the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and [fol. 3] shall annul and cancel all claim, right, and title of the said Chippewa Indians in and to such money or other property."

2. On January 14, 1889, and for many years prior thereto, various bands or tribes of Chippewa Indians, formerly a part of the great Chippewa tribe, occupied twelve reservations lying and situated within the limits of the State of Minnesota, which said reservations embraced all the lands within the limits of said State to which the Indian title had not been extinguished. Pursuant to authority contained in the Act of May 15, 1886 (24 Stat., 44), the United States endeavored to secure agreements with said bands or tribes of Indians, occupying said twelve reservations, for readjustment of their land holdings. The inchoate agreements negotiated proved unsatisfactory, and the Congress of the United States conceived a definite plan for the consolida-



tion of all the land holdings of all the different bands or tribes of Chippewa Indians, situated in the State of Minnesota, for the termination of all tribal governments and tribal relations, to clothe the Indians with full citizenship, for the cession of all their lands not necessary to make allotments to the then members of said bands or tribes, for the sale of the ceded lands by defendant, and for the equitable distribution of the proceeds received therefrom, share and share alike among the individual members of said bands or tribes, and their issue thereafter born. To carry into effect said plan, the Act of January 14, 1889 (25 Stat., 642), was enacted into law, said act providing in substance as follows:

By Section 1 the President was authorized to appoint a commission composed of three members who were directed "to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and [fol. 4] interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts, and shall not have been reserved by the Commissioners for said purposes, for the purposes and upon the terms hereinafter stated."

This section contained detailed instructions to the commissioners for the procurement of the cessions of the lands to be ceded, and then provided,

"and the acceptance and approval of such cession and relinquishment by the President of the United States shall be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms of this act provided."

Section 2 provided for the qualification of the individual members of the commission, fixed their compensation and authorized the employment of necessary employees.

Section 3 contained instructions for allotments of land in severalty to the then members of the different bands or tribes of Chippewa Indians in the State of Minnesota.



Section 4 of said Act contained express and detailed instructions for the survey and examination of all the lands ceded, and directed the classification of all forty acre lots or tracts upon which there was standing pine timber, as "pine land" and directed that as to all pine lands the Commissioner of the General Land office should list the same and set opposite the description of each forty acre lot or tract the actual cash value of the same according to his best judgment or information, but such valuation in no event to [fol. 5] be less than at the rate of \$3.00 per thousand feet board measure for all pine timber on each such lot or tract.

Section 5 provided that lands, classified as "pine lands", should, together with all timber of every kind thereon, be offered for sale at public auction to the highest bidder for cash after due and proper advertisement but should not be sold for less than the appraised value determined as above described. Plaintiffs aver that by said sections 4 and 5 provision was made to the end that there should be received for said "pine lands" and credited to plaintiffs funds under said act the full value of said lands for any and all purposes, including as an element of such value the fair value of all timber of every kind standing thereon whether pine, hardwood or otherwise.

Section 7 provided that the net proceeds to be received from the "pine lands," together with the net proceeds to be received from the lands classified as "agricultural land," should be deposited as received in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund, which should bear interest at the rate of 5 per cent per annum, payable annually for a period of fifty years. This section then contained express and detailed instructions with perfect limitations for the payment and use of the interest money and the distribution of the principal fund at the expiration of the trust period.

Within the time prescribed in Section 1 of said act, the three Commissioners were appointed, who duly qualified and entered into agreements with all of the different bands or tribes of said Indians in Minnesota in strict conformity with the provisions of said act, the said act being made a part of each agreement. The agreements, duly executed by the Commissioners and the Indians, were on March 4, 1890, approved by the President and thereupon became effective.

[fol. 6] 3. Plaintiffs aver that under and by virtue of said agreements there were ceded to the United States in trust nearly 4,000,000 acres of land including all the lands involved herein; that said lands so ceded and the whole thereof passed to the United States subject to a complete and perfectly defined trust for the disposition thereof by the United States in the manner therein set forth, and for the use and distribution of the proceeds to be received therefrom for the sole use and benefit of the designated class, plaintiffs herein, and solely in the manner and for the purposes in said trust set forth and not otherwise.

4. Plaintiffs aver, that unmindful of the nature and character of said trust and its duties and obligations thereunder as trustee, defendant, United States, in disregard thereof and in violation of the rights of petitioners herein thereunder and to their loss and injury did, by act of its Congress approved June 27, 1902 (32 Stat. at L., 400), direct that 200,000 acres of ceded lands, the large majority of which had been classified as "pine lands", be reserved from sale or other disposition and thereafter should be known as "forestry lands"; directed that the merchantable white and Norway pine timber on such of said lands as had been classified as "pine lands" be cut and sold, except 5 per cent thereof, which should be reserved from sale and left standing; and did further direct that all the islands and timber thereon in Cass Lake and in Leech Lake and not less than 160 acres at the extremity of Sugar Point, on Leech Lake, and the lands on the peninsula known as Pine Point, embracing approximately 7,000 acres, and the ten sections on the former Leech Lake Reservation, should all be withdrawn from sale and thereafter known as "forestry lands."

Plaintiffs further aver that defendant by Act of its Congress approved May 23, 1908 (35 Stat. at L., 268), did likewise, in disregard of its duties and obligations under said [fol. 7] trust and to the loss and injury of plaintiffs herein, provide for the creation of a National Forest reserve to be known as the Minnesota National Forest including therein 154,106 acres of the lands which had theretofore been classified as "pine lands", practically all of which had been reserved as "forestry lands" under the said Act of June 27, 1902; reserved from sale the lands and all timber on the ten sections, islands and points withdrawn under said Act of 1902; directed the sale under the provision of said Act of

1903 of the white and Norway pine timber upon the remaining portion of the lands classified as "pine lands" and embraced within the limits of said reserve, except 10 per cent thereof, which was to remain standing; directed the immediate appointment of three persons as commissioners, who were instructed to proceed forthwith to appraise the value of all the timber on said ten sections, islands and points, and the value of the 5 and 10 per cent of the merchantable white and Norway pine reserved from sale under the provisions of said Acts of 1902 and 1908, as aforesaid; directed that to the sum of the values of the said timber so estimated and found, said commissioners should add an amount equal to \$1.25 for each acre of land included in said forest reserve, and directed that said commissioners should certify their said findings as to the values of said white and Norway pine timber, together with the sum of \$1.25 per acre for all the "pine" and "agricultural" lands included in said Forest Reserve, to the Secretary of the Interior. Provision was made for the review and approval of the findings of said Commission by defendant's President, and the Secretary of the Treasury was directed to place the amount so finally determined to the credit of plaintiffs in their principal trust fund in the Treasury of the United States, reference being here made to said Act for greater particularity. No provision was made by said Act to compensate the Indians (fol. 8) for any elements of value in said lands except as aforesaid.

5. Plaintiffs aver that the commission authorized in section 2 of the Act of May 23, 1908, to be "at once" appointed was not appointed until December 18, 1922.

By letter dated July 29, 1922 the Commissioner of Indian Affairs designated a committee consisting of a representative of the Indian Office, a representative of the United States Forest Service and a Chippewa Indian, who was an experienced lumberman and then in the employ of the United States, to make a preliminary investigation of the claims, both "legal and equitable", of the Chippewa Indians of Minnesota against the United States for the lands and timber authorized to be taken by the Act of May 23, 1908. This committee was particularly instructed to:

"1. Ascertain the exact forest area or acres of land to be paid for at \$1.25 per acre.

"2. Ascertain the value of the timber reserved from cutting upon lands designated as the 'ten sections,' islands and points.

"3. Ascertain the value of the so-called five per cent of timber left standing for reforestation purposes under the Act of June 27, 1902 (32 Stat. 400), and of the ten per cent of timber retained for reforestation under the Act of May 23, 1908 (35 Stat. 268).

"4. Ascertain the value of the jack pine and hardwood timber and the White and Norway pine below ten inches in diameter."

Under date of November 17, 1922, the committee filed its preliminary report dated November 14, 1922.

Thereafter the identical three persons named in the letter of the Commissioner of Indian Affairs dated July 29, 1922 to make the preliminary investigation were regularly appointed and commissioned members of a commission to carry out the provisions of the Act of May 23, 1908, and advised thereof in official letters dated December 15 and 18, 1922.

Under date of January 16, 1923 said Commission made and submitted its report to the Commissioner of Indian Affairs in which the values of the land and timber they were instructed to appraise were set forth as follows:

Value of 190,944.93 acres of lands reserved and appropriated for National Forest purposes at \$1.25 per acre	\$238,681.16
Value of timber of all kinds standing upon the ten sections, islands and points	914,830.09
Value of 5% of White and Norway pine timber, more than ten inches in diameter on that portion of said 190,944.93 acres, outside of said ten sections, islands and points reserved for reforestation under Act of June 27, 1922 and of 10% of such timber reserved under said Act of May 23, 1908	366,684.33
Value of pine timber on eighteen scattered tracts within the forest which defendant had been unable to dispose of	183.17
Value of 90% of White and Norway pine on certain tracts within said forest wrongfully classified as agricultural lands	20,000.00



Value of White and Norway pine less than ten inches in diameter, jackpine, poplar, birch, oak, basswood, ash, elm, spruce, tamarack, balsam, and cedar timber standing on that part of said 190,944.93 acres outside of said ten sections, islands and points ..... \$1,060,887.07

Said commissioner further reported that by reason of long delay in settlement, the Indians had lost interest at the rate of 5% per annum for approximately fourteen years and that no provision to compensate the Indians for this loss was included in any of the valuations above set forth.

[fol. 10] Said commission further reported that under the Act of May 23, 1908 there was no authority for any award to the Indians on account of any of the items above described, save only the first three items above set forth. In consequence said commission certified to the Secretary of the Interior an award totaling \$1,490,195.58 made up solely of the said first three items, which award was thereafter and on April 9, 1923 confirmed by the President and the amount thereof credited to plaintiffs' principal trust fund as in said Act of May 23, 1908 provided.

6. On May 26, 1926 pursuant to Act of February 28, 1925 (43 Stat. 1052) defendant credited to "Interest on Chippewas in Minnesota fund" (which was the non-interest bearing fund to which interest accruing under said Act of January 14, 1889 was credited) the sum of \$493,044.54 in payment of the following items found by said commission to be equitable due to the Indians as result of the creation of said National Forest:

Interest on the value (\$238,681.16) of the land and value (\$366,684.33) of the 5 and 10% of the timber left standing fixed in the award as of 1908 .....	\$402,755.84
Value of pine timber on eighteen scattered tracts within the forest which defendant had been unable to dispose of .....	183.17
Value of 90% of White and Norway pine on certain tracts within said forest wrongfully classified as agricultural lands .....	20,060.00
Interest on above payments from February 1, 1923, (date of award) .....	70,105.53



By said credits aforesaid defendant paid and discharged each and all of the amounts found by said commission to be equitably due to the Indians on account of creation of said National Forest, save and except that no amount has ever been paid or credited to plaintiffs or their trust fund [fol. 11] on account of the value of said timber appraised by said commission at \$1,060,887.07, and in which sum, together with interest thereon from April 9, 1923 to date of payment defendant is justly indebted to plaintiffs.

7. Prior to the adoption of the Act of January 14, 1889 (25 Stat. 642) the defendant, the United States had assumed to survey and establish the boundaries of the reservations in Minnesota occupied by the Chippewa Indians of Minnesota. In the making of such surveys and establishing of such boundaries errors occurred, as a result of which there were wrongfully excluded from the Indian reservations as the same had been established by prior treaties with the Indians, a total of 16,365.80 acres of lands, which lands the defendant, United States, in consequence of errors aforesaid, and prior to January 14, 1889 had disposed of under its public land laws without any credit to the Indians therefor. All lands within the true boundaries of said Indian reservations were ceded by the Indians to the defendant, United States by the agreements entered into under said Act of January 14, 1889, and the United States by said agreements agreed that all said lands including said 16,365.80 acres wrongfully excluded from said reservations and previously disposed of as aforesaid, should be disposed of for the benefit of the Indians under said Act. By reason of said prior disposal said lands were never disposed of for the benefit of the Indians nor has any payment been made on account thereof, the fair and reasonable value of said lands being \$1.25 per acre.

Wherefore plaintiffs pray judgment against defendant, United States in the following amounts:

1. For the sum of \$1,060,887.07 together with interest thereon from April 9, 1923 at the rate of 5% per annum.
2. For the sum of \$20,457.25 together with interest thereon at the rate of 5% per annum from March 4, 1890 on account [fol. 12] of wrongful disposal of said 16,365.80 acres of land as set out in paragraph seven.

3. For such other and further relief as to the court may seem just and equitable. For their costs and disbursements herein.

The Chippewa Indians of Minnesota, by Webster Ballinger and Baldwin, Holmes, Mayall, & Reavill,  
Their Attorneys.

*Duly sworn to by Webster Ballinger and D. S. Holmes.  
Jurat omitted in printing.*

[fol. 13] III. GENERAL TRAVERSE TO AMENDED PETITION—  
Filed October 1, 1935

And now comes the Attorney General, on behalf of the United States, and answering the amended petition of the claimant herein, denies each and every allegation therein contained; and asks judgment that the amended petition be dismissed.

Harry W. Blair, Assistant Attorney General.

[fol. 14] IV. HISTORY OF PROCEEDINGS

This case was argued and submitted on merits on May 6, 1937, by Mr. Webster Ballinger and Mr. Donald S. Holmes, for plaintiff, and by Mr. Walter C. Shoup, for defendant.

On October 4, 1937, the court entered the following order:

Order

It Is Ordered this 4th day of October, 1937, that this case be and it is remanded to the November Calendar for oral argument on the items claimed by the Government as a set-off.

V. ARGUMENT AND SUBMISSION ON ORDER OF REMAND

On November 2, and 3, 1938, this case re-argued and re-submitted on order of remand on the items claimed by the Government as set-off, by Mr. Walter C. Shoup, for defendant, and by Mr. Donald S. Holmes and Mr. Webster Ballinger, for plaintiff.

## VI. FURTHER PROCEEDINGS HAD IN CASE

On January 12, 1938, the court filed special findings of fact, conclusion of law and opinion by Williams, J., and entered a judgment dismissing the petition,

On February 19, 1938, the plaintiff filed a motion for a new trial.

On March 7, 1938, the defendant filed a motion for a new trial.

---

On May 31, 1938, the court entered the following order on said motions:

[fol. 15] VII. ORDER ON MOTIONS FOR NEW TRIAL—May 31, 1938

### Order

This case comes before the court on plaintiff's motion for new trial and on defendant's motion for new trial. On consideration thereof It Is Ordered this 31st day of May, 1938, that plaintiff's said motion be and the same is overruled and that defendant's motion be and the same is allowed in part and overruled in part.

It Is Further Ordered that finding 15 of the court's special findings of fact filed herein January 12, 1938, be and the same is amended by striking out the second sentence thereof. That sentence reads as follows:

"The Indian title to all lands within the true boundaries of the Red Lake Reservation, as fixed in the treaties of February 22, 1855, and October 2, 1863, was ceded to the United States by the agreement made under the act of January 14, 1889, upon condition that the lands thereby ceded should be sold and disposed of for the benefit of the Indians as in said Act provided."

The findings as thus amended and the judgment and opinion of the court as heretofore announced will stand.

[fol. 16] **VIII. Special Findings of Fact, Filed January 12, 1938, as Amended by the Order of May 31, 1938, Conclusion of Law and Opinion of the Court by Williams, J.**

Messrs. Webster Ballinger and Donald S. Holmes for the plaintiffs. Baldwin, Holmes, Mayall & Reavill were on the brief.

Mr. Walter C. Shoup, with whom was Mr. Assistant Attorney General Carl McFarland, for the defendant. Mr. Frank Chambers, Acting Assistant Attorney General, and Mr. George T. Stormont were on the brief.

The court, upon the evidence adduced, makes the following

#### **SPECIAL FINDINGS OF FACT**

1. The act approved May 14, 1926 (44 Stat., 555), as amended by the acts approved April 11, 1928 (45 Stat., 423), and June 18, 1934 (48 Stat., 979), made a part hereof by reference, provides in part:

That jurisdiction be, and is hereby, conferred upon the Court of Claims, with right of appeal to the Supreme Court of the United States by either party as in other cases, notwithstanding the lapse of time or statutes of limitations, to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of the Act of January 14, 1889 (25 Stat. L. 642), or arising under or growing out of any subsequent Act of Congress in relation to Indian Affairs which said Chippewa Indians of Minnesota may have against the United States, which claims have not heretofore been de- [fol. 17] termined and adjudicated on their merits by the Court of Claims or the Supreme Court of the United States. In any such suit or suits the plaintiffs, the Chippewa Indians of Minnesota, shall be considered as including and representing all those entitled to share in the final distribution of the permanent fund provided for by section 7 of the Act of January 14, 1889 (25 Stat. L. 642), and the agreement entered into thereunder: \* \* \*

Sec. 2. Any and all claims against the United States within the purview of this Act shall be forever barred unless suit or suits be instituted or petition filed as herein provided in the Court of Claims within five years from the date of the approval of this Act, and such suit or suits shall make



the Chippewa Indians of Minnesota party plaintiff and the United States party defendant. The petition shall be verified by the attorney or attorneys employed to prosecute such claim or claims under contract with said Chippewa Indians approved in accordance with existing law; and said contract shall be executed in their behalf by a committee or committees to be selected by said Chippewa Indians as hereinafter provided. Official letters, papers, documents, and records, or certified copies thereof, may be used in evidence, and the departments of the Government shall give access to the attorney or attorneys of said Chippewa Indians to such treaties, papers, correspondence, or records as they may require in the prosecution of any suit or suits instituted under this Act.

Sec. 3. In said suit or suits the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against the said Chippewa Indians, and any payment or payments which may have been made by the United States upon any claim against the United States by said Indians shall not operate as an estoppel, but may be pleaded as an offset in such suit or suits as may gratuities, if any, paid to or expended for said Indians subsequent to January 14, 1889.

Sec. 4. If it be determined by the court that the United States, in violation of the terms and provisions of any law, treaty, or agreement as provided in section 1 hereof, has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal, together with interest thereon at 5 per centum per annum from the date thereof; and with reference to all claims which may be the subject matter of the suits herein authorized, [fol. 18] the decree of the court shall be in full settlement of all damages, if any, committed by the Government of the United States and shall annul and cancel all claim, right, and title of the said Chippewa Indians in and to such money or other property.

Sec. 10. The proceeds of all amounts, if any, recovered for said Indians shall be deposited in the Treasury of the United States to the credit of the Indians decreed by said court to be entitled thereto, and shall draw interest at the



rate of 5 per centum per annum from the date of the judgment or decree. The costs incurred in any suit hereunder shall be taxed against the losing party; if against the United States such costs shall be included in the amount of the judgment or decree, and if against said Indians shall be paid by the Secretary of the Treasury out of the funds standing to their credit in the Treasury of the United States.

2. Under the provisions of the original act, plaintiffs, Chippewa Indians of Minnesota, filed their petition in this case May 5, 1927; defendant filed its general traverse thereto June 14, 1927; amended petition by leave of Court was filed August 22, 1935, and defendant filed its general traverse thereto October 1, 1935.

3. Plaintiffs, the Chippewa Indians of Minnesota, constitute the class designated and described in the act of January 14, 1869 (25 Stat. 642), and the agreements entered into pursuant thereto, as "all the Chippewa Indians of Minnesota," and the class authorized by the acts cited in Finding 1 hereof to maintain suits, as therein provided.

4. The act of January 14, 1869 (25 Stat. 642), made a part hereof by reference, among other things (Sec. 1) authorized the President to appoint three commissioners to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations, and to all and so much of these two reservations as in the judgment of said commission was not required to make and fill the allotments required "by this and existing acts and shall not have been reserved by the commissioners for said purposes, for the purposes and upon the terms hereinafter stated." The agreements of cession were [fol. 19] required to be approved by the President of the United States before taking effect, which approval the act declared "shall, be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this act provided."

5. The commission was appointed and entered into agreements with all the tribes and bands of Chippewa Indians in Minnesota ceding all the lands in suit.

6. The terms of cession, as stated in the act of January 14, 1889 (Sec. 4), required the Commissioner of the General Land Office to cause all the lands so ceded to the United States to be surveyed in the manner provided by law for the survey of public lands, and directed the Secretary of the Interior, as soon as practicable after the survey had been approved, to appoint competent and experienced examiners to personally make a careful, complete, and thorough examination of the ceded lands by forty-acre lots, for the purpose of ascertaining on which lots there was standing or growing pine timber and to classify all such lots as "pine lands" and make due entry thereof in books provided for that purpose, showing with particularity the amount and quality of all pine timber standing or growing on any lot so classified, the amount to be estimated by feet in the manner usual in estimating such timber, and submit report of their work to the Commissioner of the General Land Office. Thereupon the Commissioner was directed to make a list of all such "pine lands," describing each forty-acre lot separately, and opposite each such description to place the actual cash value of the lot, according to his best judgment and information, but in no event to fix the valuation of the lot at less than the value of the pine timber thereon computed at a rate of not less than \$3 per thousand feet board measure. The lists so prepared were subject to approval or rejection by the Secretary of the Interior, and if approved, fixed the minimum price for which the lands could be sold. All lands so listed (Sec. 5), and the listing approved by the Secretary of the Interior, were directed to be proclaimed as in market, and each lot offered for sale separately, and after advertisement [fol. 20] as required by said act, sold at public auction to the highest bidder for cash at not less than its appraised value.

All lands not classified as "pine lands" were (Sec. 6) directed to be classified as "agricultural lands" and disposed of under the homestead laws at \$1.25 per acre.

The net proceeds (Sec. 7) received from all the ceded lands were directed to be placed "in the Treasury of the United States to the credit of all the Chippewa Indians in

the State of Minnesota as a permanent fund," to draw interest at the rate of five per centum per annum, payable annually for the period of fifty years, three-fourths of said interest to be annually paid to the Indians in cash and one-fourth to be expended for their education. At the expiration of the fifty year period the permanent fund was directed to be "divided and paid to all of said Chippewa Indians and their issue then living, in cash, in equal shares."

7. The act of June 27, 1902 (32 Stat. 400), made a part hereof by reference, recited in its text that sections 4, 5 and 7 of the act of January 14, 1889, were amended to read as therein provided. The amendments to sections 4 and 7 are not here material. Section 5 was amended in the following respects: The pine timber was directed to be sold separate from the land; the Secretary was authorized, after advertisement, to receive bids for the merchantable pine timber on not exceeding ten sections in any one bid; all sales were to be made upon separate sealed bids for the timber on each lot; no sale was to be approved for less than the minimum price of \$4 per thousand feet board measure for Norway pine and \$5 per thousand feet board measure for white pine; the Secretary was authorized to accept any, or reject all, bids; all timber sold was to be cut, banked, and scaled in the log according to Scribner's rules, and paid for at the sale price per thousand feet, with the following proviso:

That in cutting the timber on two hundred thousand acres of the pine lands, to be selected as soon as practicable by the Forester of the Department of Agriculture, with the approval of the Secretary of the Interior, on the following reservations, to wit, Chippewas of the Mississippi, Leech Lake, Cass Lake, and Winnepigoshieh, which said lands so selected shall be known and hereinafter described as "forestry lands," the purchaser shall be required to leave [fol. 21] standing five per centum of the pine timber thereon for the purpose of reforestation, as hereinafter provided, said five per centum to be selected and reserved in such manner and under such rules and regulations as may be prescribed by the Forester of the Department of Agriculture and approved by the Secretary of the Interior:

Provided further, That there shall be reserved from sale or settlement the timber and land on the islands in Cass

lake and in Leech Lake, and not less than one hundred and sixty acres at the extremity of Sugar Point, on Leech Lake, and the peninsula known as Pine Point, on which the new Leech Lake Agency is now located, which peninsula approximates seven thousand acres, and in addition thereto ten sections in area on said reservations last aforesaid, to be selected by the Forester of the Department of Agriculture, with the approval of the Secretary of the Interior, in lots not less than three hundred and twenty acres each in contiguous areas, and nothing herein contained shall interfere with the allotments to the Indians heretofore and hereafter made. The islands in Cass and Leech lakes and the land reserved at Sugar Point and Pine Point Peninsula shall remain as Indian land under the control of the Department of the Interior.

When the merchantable pine timber on any tract, except on the lands reserved for forestry purposes, was removed, the tract was directed to be opened to homestead entry, and disposed of at \$1.25 per acre. When 95% of all the merchantable pine timber on any tract reserved for forestry purposes, except the 10 sections, islands, and points, was removed, such tract was declared to, "without further act, resolution, or proclamation, forthwith become and be part of a forest reserve, the same as though set apart by proclamation of the President in accordance with the Act of Congress approved March 3, 1891, and subsequent laws amending and supplementing the same, and shall be managed and protected in accordance with their provisions and the rules and regulations made and to be made in furtherance thereof."

8. The act of May 23, 1908 (35 Stat. 268) created a national forest in the State of Minnesota, described by metes and bounds. Among the lands so included within the reserve were a part of the 200,000 acres authorized by section 2 [fol. 22] of the act of June 27, 1902, to be selected by the Forester of the Department of Agriculture, and the ten sections, islands and points, specifically referred to in that Act, and also "one hundred and sixty acres at the extremity of Sugar Point, on Leech Lake, and the peninsula known as Pine Point, on which the new Leech Lake Agency is now located, . . ."



### Section 2 of the act provided:

The Secretary of the Interior is hereby authorized to proceed with the sale of the merchantable pine timber upon the above described land outside of said ten sections and said islands and points, in conformity with the provisions of said Act above entitled, and reserving ten per centum of such timber from sale, said ten per centum to be designated by the Forester of the United States Department of Agriculture; and as to the timber upon said ten sections and said islands and points, the said Forester is authorized, under such rules and regulations as he may prescribe from time to time to sell and dispose of so much of the standing timber thereon as he may deem wise and advisable in the conduct of a National Forest: Provided, That a commission of three persons shall at once be appointed, consisting of one person to be designated by the President, one by the Secretary of the Interior, and one by a general council of the Indians of the Winnibagoishish, Cass Lake, Chippewas of the Mississippi Reservation, and Leech Lake Reservation to be held under the direction of the Agent at Leech Lake Indian Agency; and said commissioners shall proceed forthwith to appraise the value of the five per centum of timber heretofore reserved from sale by the provisions of said Act entitled "An Act to amend an Act entitled 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota,'" approved January fourteenth, eighteen hundred and eighty-nine, and the ten per centum hereafter reserved under the provisions of this Act, and the timber upon said ten sections and upon the unappropriated lands on said islands and points, and shall ascertain the acreage of actual land included under the provision of this Act and to the estimated value of said five per centum of timber reserved under the said Act entitled "An Act to amend an Act entitled 'An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota,'" approved January fourteenth, eighteen hundred and eighty-nine, and [fol. 23] the ten per centum reserved under this Act and the estimated value of timber upon said ten sections and upon the unappropriated lands on said islands and points, to the sum of the values of the timber so estimated shall add an amount equal to one dollar and twenty-five cents for each and every acre of land not otherwise appropriated which they find covered by the provisions of this Act, and shall



certify the same to the Secretary of the Interior. The Indians designated in this section, acting through a representative who shall serve without compensation, to be named by them at the time of their appointment of the commissioner herein, shall have sixty days in which to appeal to the President of the United States from the findings of said commissioners, as certified to the Secretary of the Interior. At the end of said sixty days, if no appeal has been taken or if an appeal has been taken, then, upon the determination thereof by the President, the Secretary of the Interior shall certify the amount found by said commissioners, or if modified by the President the amount determined by him, to the Secretary of the Treasury, who shall thereupon place such amount to the credit of all the Chippewa Indians in the State of Minnesota as a part of the permanent fund of said "All of the Chippewa Indians in the State of Minnesota" provided for in an Act of Congress entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine, and the Acts supplementary thereto, and the amounts so certified to the Secretary of the Treasury shall draw interest at the rate of five per centum per annum, pursuant to the terms of said Acts.

Section 3 authorized Indians who had received allotments within the limits of the national forest, or their heirs, to relinquish their allotments within the forest area and to select a like quantity of unappropriated, unreserved land within the limits of any of the ceded lands in Minnesota outside of the forest reserve, and the Secretary of the Interior, upon request of the Department of Agriculture, was authorized to purchase relinquishments from said Indians or their heirs, and to pay for the same from moneys received from the sale of timber from the forest reserve; all lands so relinquished to become a part of the forest reserve.

[fol. 24] Sec. 5. That all moneys received from the sale of timber from any of the lands set aside by this Act for a National Forest, prior to the appraisal herein provided for, including all moneys received for timber under sales made by the Secretary of the Interior as authorized by existing laws and section two of this Act, shall be placed to the credit of the Chippewa Indians in the State of Minnesota, as pro-

vided for in an Act of Congress entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine; and the Acts supplementary thereto, and shall draw interest at the rate of five per centum per annum, pursuant to the terms of said Acts; and after said appraisal the National Forest hereby created, as above described, shall be subject to all general laws and regulations from time to time governing national forests, so far as said laws and regulations may be applicable thereto.

Sec. 6. That the commissioners provided for herein shall receive a compensation of ten dollars per day each for each and every day actually spent upon the work herein provided for, which shall be paid out of any money in the Treasury of the United States not otherwise appropriated, and no commissioner shall be paid for more than ten days' service.

Section 8 contains a declaration that defendant, as Trustee, will dispose of all the ceded lands and timber thereon and deposit the proceeds as provided in the acts of January 14, 1889, June 27, 1902, and this Act.

9. The commission authorized in Section 2 of the act of May 23, 1908, to be "at once" appointed was not appointed until December 18, 1922.

Under date of January 19, 1922, the Solicitor for the Department of Agriculture in a written opinion held, that payment could only be made for the lands and timber reserved under the acts of June 27, 1902, and May 23, 1908, as provided in the latter Act; that under said Act all timber of value on the 10 sections, islands and points should be taken into consideration and appraised "at its value as of the time [fol. 25] of the appraisal"; that only the 5 and 10% of the merchantable white and Norway pine reserved on the remaining lands included in the forest reserve were to be appraised, and the value thereof should be that "existing at the time of the appraisal." This opinion of the Solicitor for the Department of Agriculture was approved by the Solicitor for the Department of the Interior.

By letter dated July 29, 1922, the Commissioner of Indian Affairs designated a committee consisting of a representative of the Indian Office, a representative of the United States Forest Service, and a Chippewa Indian, an experienced lumberman then in the employ of the United States,

to make a preliminary investigation of the claims, both "legal and equitable", of the Chippewa Indians of Minnesota against the United States for the land and timber authorized to be taken by the act of May 23, 1908. This committee was particularly instructed to:

1. Ascertain the exact Forest area or acres of land to be paid for at \$1.25 per acre.

2. Ascertain the value of the timber reserved from cutting upon lands designated as "the Ten Sections, islands and points."

3. Ascertain the value of the so-called five per cent of timber left standing for reforestation purposes under the act of June 27, 1902 (32 Stat., 400), and of the ten per cent of timber retained for reforestation under the act of May 23, 1908 (35 Stat., 268).

4. Ascertain the value of the jack pine and hardwood timber and the white and Norway pine below 10" in diameter for which the Indians by opinion of January 19, 1922, rendered by the Solicitor for the Department of Agriculture and concurred in by the Solicitor for the Department of the Interior, are not entitled to compensation under the law (act of May 23, 1908).

Under date of November 17, 1922, the committee filed its report dated November 14, 1922.

10. Thereafter the identical three persons named in the letter of the Commissioner of Indian Affairs dated July 29, 1922, to make the preliminary investigation were regularly appointed and commissioned members of a commission to [Vol. 26] carry out the provisions of the act of May 23, 1908, and advised thereof in official letters dated December 15 and 18, 1922.

The commission, as such, made no investigation in the field, and used as the basis for its report and award the report of the committee appointed by the Commissioner's letter of July 29, 1922, and under date of January 16, 1923, submitted its report and award to the Commissioner of Indian Affairs.

In the report the commission correctly found and reported that the boundaries of the Minnesota National Forest as defined by the act of May 23, 1908, embraced a total of 312,659.42 acres of land. Of this acreage, a total of 121,

714.31 acres was embraced in State swamp land selections, individual Indian allotments and patented town sites which constituted no part of the national forest. The deduction of 121,714.31 acres from the total land area within the national forest boundaries left a remainder of 190,944.93 acres which were reserved and appropriated under the act of May 23, 1908, for national forest purposes. Said 190,944.93 acres, when appropriated and reserved for national forest purposes under the act, were reasonably worth an average of \$1.25 per acre or \$238,681.16 in addition to the value of any timber standing thereon.

The Commissioner further correctly determined in accordance with the act and reported that the value of the timber of all kinds standing upon the "ten sections" specifically referred to in the act of May 23, 1908, and upon the unappropriated lands on the islands and points in the act described was \$914,830.09.

Said commission correctly determined that the value of the five percent of merchantable white and Norway pine timber, more than ten inches in diameter, standing upon that portion of the 190,944.93 acres outside of the ten sections, islands, and points, and reserved for reforestation under the act of June 27, 1902; and of the ten percent of such timber reserved for said purposes under the act of May 23, 1908, was \$336,684.33.

In accordance with their findings aforesaid, the commission appointed under the act of May 23, 1908, on January 16, [fol. 27] 1923, certified to the Secretary of the Interior an award totaling \$1,490,195.58 made up of the following items:

190,944.93 acres at \$1.25 .....	\$238,681.16
Values of all timber on ten sections, islands, and points .....	914,830.09
Value of 5 and 10% reserved timber .....	336,684.33
<b>Total award .....</b>	<b>1,490,195.58</b>

An appeal to the President of the United States was duly taken by the authorized representative of the Indians within seasonable time, but on April 9, 1923, the award so made was approved by the President of the United States and thereafter certified by the Secretary of the Interior to the Secretary of the Treasury, who thereafter and on May 31, 1923, placed the same to the credit of the Chippewa Indians of



Minnesota as part of the "permanent fund" created under the act of January 14, 1889.

11. The commission in its report to the Commissioner of Indian Affairs stated that the values of the lands and timber found by it, and set out in the preceding finding—

meet the legal requirements of the Act of May 23, 1908, but exclude equitable considerations in that they make no provision for payment of the value of the white and the Norway pine below 10 inches in diameter or for any jack pine and hardwoods standing on lands other than the ten sections, islands, and points. Further, they do not include any interest at the rate of five per cent per annum which through delay on the part of the Government in carrying out the terms of the said act has been lost to the Indians for a period of 14 years. The findings do not include the value of 44,333 ft. board measure, of mature pine timber standing upon eighteen 40-acre tracts or lots which have been offered for sale, but for which no applications have been received; nor do they include the timber standing upon lands which through erroneous classification as agricultural lands have hitherto been excluded from timber sale advertisements and contracts, but from which 90 per cent of the merchantable timber should properly be sold for the credit of the Indians before a change occurs in the legal status of the lands. These equitable considerations which are fully set out in the report of the preliminary committee are here briefly discussed as follows:

In his opinion of January 19, 1922, the Solicitor for the Department of Agriculture held that the use of the term [fol. 28] "merchantable pine timber," in relation to lands other than the ten sections, islands, and points, showed a clear intention on the part of Congress to allow the Indians compensation only for timber reserved from cutting which was merchantable at the time of the passage of the said Act of 1908. Since the preponderance of evidence was to the effect that the white and Norway pine under 10 inches in diameter, and jack pine and hardwoods of all diameters was not commonly regarded as merchantable in 1908, it was the belief of the said Solicitor that no allowance should be made for such classes of timber in determining the amounts to be paid to the Indians. The Solicitor of the Department of the Interior concurred in this view. Because of these



opinions the Commission in determining the amounts due the Indians excluded from their appraisal all such timber standing upon lands cut over under the Acts of 1902 and 1908.

The Commission finds, however, that these classes of timber now possess well-defined and considerable commercial value, which as a matter of equity should be recognized by the Government; and, therefore, recommends that Congress be asked to enact legislation authorizing the appraisal of said timber and proper payment to the Indians therefor.

The volume and the exact value of such timber have not been determined by careful estimate and appraisal; but superficial estimates and appraisals conducted jointly by representatives of the Indian Service and of the Forest Service during the fall of 1922, resulted in finding the value thereof to be approximately \$1,060,887.70.

Had the settlement authorized by the Act of 1908 been made promptly as the law required, the money due the Indians for the lands within the forest—190,944.93 acres at \$1.25 per acre—amounting to \$238,681.16, and for the five and ten per cent reserved seed trees of white and Norway pine amounting to \$336,684.33, would have been credited to them on the books of the Treasury, and would have begun to draw interest at the rate of five per cent per annum—probably not later than January 1, 1909. The Indians to date have lost 14 years interest, or an equivalent of 70 per cent of the value which would have been found in 1908.

The value of the lands plus that of the reserved timber would amount to a total of \$575,365.49, which at five per cent interest for 14 years would amount to \$402,755.84. [fol. 29] Recommendation was made by your preliminary committee that remedial legislation be obtained from Congress allowing interest on these deferred payments.

Your Commission is of the opinion that the Congress should allow a reasonable interest on the said deferred payments, as set out above, to compensate the Indians for all their equities in the lands and timber as above indicated.

As shown on page 7 of the report of the preliminary investigating committee submitted under date of November 14, 1922, there are reserved within the National Forest 18 described parcels of land upon which there is mature pine timber. Repeated attempts by the General Land Office to dispose of this timber by sale have been unsuccessful be-

cause of lack of demand. Upon these lands there is a total stand of 15,833 feet of white pine and 28,500 feet of Norway pine. At the minimum rates fixed by law the value of this timber would be \$183.17. According to the opinions of the Solicitors no allowance can be made for this timber under the Act of 1908, and as it cannot be sold there appears to be no way by which the Indians can be compensated for it, except through proper remedial legislation.

Certain lands within the Forest bearing commercial timber were erroneously classified by the General Land Office as "agricultural," and therefore the timber thereon has been excluded from all timber sale estimates and agreements. A table furnished by Mr. J. D. Caldwell, Superintendent of Logging, General Land Office, dated November 27, 1922, describes the erroneously classified lands which contain merchantable timber and gives the total volume of timber thereon as 900,000 ft. of white pine, and 1,214,000 ft. of Norway pine. This has an approximate value of \$20,000, but cannot be paid for under the Act of May 23, 1908. To fully protect the equities of the Indians your preliminary committee again submitted the matter December 14, 1922, whereupon recommendation was made December 16, last, to the General Land Office that immediate action be taken looking to the proper advertisement and sale of the timber in question in order that the proceeds therefrom might be placed to the credit of the Indians.

12. In the report of the Secretary of the Interior to the Chairman of the Committee on Indian Affairs of the House of Representatives, No. 27, 66th Congress, it was recommended that the Indians be paid the sum of \$402,755.84 as interest on the award of the commissioners above de-[fol. 30] scribed, and the further sum of \$183.17 which was the fair value of 44,333 board feet of pine standing on 18 scattered tracts within the forest which the defendant had been unable to dispose of, and the further sum of \$20,000.00 being the fair value of 90% of the white and Norway pine timber more than ten inches in diameter standing upon certain tracts within the forest which had theretofore been wrongly classified as agricultural lands and hence excluded from timber sale advertisements, all as recommended by the appraisal committee as set out in Finding 11. These three items amounted to \$422,939.01. By act of March 3,

1926, 44 Stat. 173, there was appropriated the sum of "\$422,939.01, with interest thereon at the rate of 5 per centum per annum from February 1, 1923, to the date of settlement, said total amount to be deposited to the credit of the Chippewa Indians of Minnesota as interest on the permanent fund arising under the provisions of section 7 of the Act of January 14, 1889, as authorized by the Act of February 28, 1925." Thereafter and on May 26, 1926, defendant credited the sum of \$422,939.01, together with interest thereon from February 1, 1923, to May 26, 1926, in the further sum of \$70,105.53 to "Interest on Chippewas in Minnesota Fund." Save and except for the award of \$1,490,195.58 credited as described in Finding 10 hereof to the "Chippewas in Minnesota Fund" (which was the permanent principal fund provided for and created under the act of January 14, 1889, and the said sums credited as above set forth to "Interest on Chippewas in Minnesota Fund" (which was the non-interest bearing fund to which the interest accruing under the act of January 14, 1889, was credited), no payments have been made to plaintiffs or credited to them or their funds in any manner on account of the establishment of the national forest under the act of May 23, 1908, or for the value of any lands included therein.

13. December 5, 1923, a bill was introduced in the House of Representatives (H. B. 28, 68th Congress, 1st Session) entitled "A Bill to compensate the Chippewa Indians of Minnesota for certain equities claimed by them in connection with the settlement for the Minnesota National Forest," which authorized an appropriation out of the Treasury of the United States of the sum of \$1,060,887.70 to be [fol. 31] credited to the general fund of the Chippewa Indians of Minnesota arising under the provisions of Section 7 of the act of January 14, 1889. The bill was designed and intended to carry out the recommendation of the appraisal committee appointed under the act of May 23, 1908 (set out in Finding 11), wherein it was recommended that Congress be asked to enact legislation authorizing the appraisal of all merchantable timber on all lands classified as pine lands, other than the sections, islands, and points, and the five and ten per cent reserved under the acts of 1902 and 1908, for which the committee was unable under the terms of the act of May 23, 1908, to award compensation, and provide



proper payment to the Indians therefor, which timber the committee on the basis of superficial estimates made by it fixed at the approximate value of \$1,060,887.70. The bill was considered by a sub-committee of the House Committee on Indian Affairs, before whom an attorney representing the Indians appeared and objected on behalf of the Indians to the enactment of the bill into law if it was designed and intended as a complete settlement of all claims of the Indians arising out of the 190,944.93 acres to be taken as a forest reserve, as the amount authorized to be appropriated by the bill was inadequate consideration for their claims, and insisted that this claim, together with all other claims of the Indians, be referred to the Court of Claims for judicial determination. No action was taken by the Committee or Congress on the bill, and thereafter Congress enacted, and the President approved on May 14, 1926, the jurisdictional act under which this claim is being prosecuted.

14. In addition to all timber for which the Indians have been paid, there was also standing upon that part of the 190,944.93 acres outside of the ten sections, islands, and points, at the time the lands were taken for national forest purposes under the act of May 23, 1908, certain additional timber including white and Norway pine less than ten inches in diameter, jackpine, poplar, white birch, yellow birch, oak, basswood, ash, elm, spruce, tamarack, balsam; and cedar, of a total fair value, as of 1922, of \$1,060,887.70. No allowance was made for the value of the timber in the report of the commission appointed under the act of May 23, 1908, for the reasons stated in their report and set out [fol. 32] in Findings 11 and 13, nor has any sum been paid or credited to plaintiffs on account thereof.

15. As the result of errors in surveys approved June 21, 1872, December 14, 1875, and November 23, 1885, there were mistakenly included within the boundaries of the Red Lake Reservation fixed in the treaties of February 22, 1855 (10 Stat. 1165), and October 2, 1863 (13 Stat. 667), 31,933.96 acres of defendant's lands, and mistakenly excluded from within the boundaries of the reservation as fixed in the treaties, 48,299.76 acres set aside by the latter treaty for the use of the Indians, resulting in a loss to the Indians. The 16,365.80 acres mistakenly excluded from the Red Lake Reservation as the result of said erroneous surveys were



taken and held by the United States as public lands and prior to January 14, 1889, disposed of by the United States under its public land laws, without any consideration therefor to the Indians.

The price fixed by defendant at the time of the appropriation for like lands was \$1.25 per acre. By the agreements of cession made under the act of January 14, 1889, plaintiffs ceded all their right, title, and interest in and to all the reservations in the State of Minnesota, except certain lands for allotment purposes not material here, to be sold and fixed the minimum sale price at \$1.25 per acre.

16. In the settlement made on May 26, 1926, with the Chippewa Indians of Minnesota for lands taken under the Free Homestead Act, under authority of the act of February 9, 1925, and the act of March 3, 1926, the Indians were paid for 6,236.60 acres in excess of the actual acreage taken, at the rate of \$1.25 per acre, amounting to \$7,795.75; and were also paid interest thereon at the rate of 5 per cent per annum from December 31, 1922, to May 26, 1926, amounting to \$1,325.25, making a total overpayment of \$9,121.00, no part of which has been repaid to the United States.

[fol. 33] 17. The treaty with the Chippewa Indians of the Mississippi, concluded March 19, 1867 (16 Stat. 719), provided:

Art. III. In further consideration for the lands herein ceded, . . . the United States agree to pay the following sums, to wit: . . . four thousand dollars each year for ten years, and as long as the President may deem necessary after the ratification of this treaty, for the support of a school or schools upon said reservation . . .

Subsequent to the payment by the United States of the last of the ten installments agreed in Article III of the Treaty of 1867, the United States disbursed for the maintenance of schools on the White Earth and Leech Lake reservations in Minnesota for the benefit of Chippewa Indians of Minnesota the further sum of \$167,125.52, no part of which sum has been reimbursed to the United States.

18. During the period January 14, 1889, to January 30, 1927, the United States, although under no obligation so to do, expended out of public funds for the benefit of the Chippewa Indians of Minnesota under specific appropria-

tions the sum of \$409,551.21 for the purposes and in the amounts shown by the following table:

Education	\$153,368.95
Pay of farmers	12,844.98
Miscellaneous employees	35,037.93
Saw and grist mills	5,088.86
Telephone lines	1,000.00
Purchase of land for allotment	645.00
Agricultural aid	5,160.06
Clothing	8,611.67
Provisions and other rations	31,008.80
Agricultural implements and equipment	19,654.06
Work and stock animals	550.00
Feed and care of livestock	2,910.41
Agency buildings and repairs	16,200.81
Miscellaneous building material	245.00
Boats, docks, etc.	2,359.71
Enrollment of allottees	15,763.97
Burial of Indians	300.07
Surveying, allotting, sale, etc., lands	7,182.70
Bridges	1,690.00
Roads	200.00
Fuel and light	1,512.03
Miscellaneous agency expenses	726.91
[fol. 34] Hardware, glass, oils, and paints	24,424.64
Medical attention	33,511.19
Indian houses	150.00
Household equipment	6,393.18
Pay of mechanics	23,010.28
	<hr/>
	409,551.21

No part of the aforesaid sum of \$409,551.21 has been reimbursed to the United States.

19. During the period January 14, 1889, to June 30, 1927, the United States, although under no obligation so to do, expended out of public funds for the Chippewa Indians of Minnesota under other than treaty appropriations the sum of \$2,426,834.44 for the purposes and in the amounts shown by the following table:

Education	\$1,275,968.67
Medical attention	21,395.14

Agency buildings and repairs	111,353.96
Miscellaneous building material	16,965.80
Saw and grist mills	374.07
Expenses, care, and sale of timber	80,071.18
Examining and appraising land	7,345.28
Surveying, Allotting, sale, etc., lands	15,442.80
Removals	49.58
Provisions and other rations	13,437.50
Agricultural implements and equipment	857.82
Work and stock animals	1,050.00
Feed and care of livestock	9,902.97
Hardware, glass, oils, and paints	5,228.18
Household equipment	1,527.40
Fuel and light	2,313.63
Pay of mechanics	7,045.61
Miscellaneous employees	11,219.71
Transportation of supplies	189,038.18
Agricultural aid	5,424.50
Miscellaneous agency expenses	45,110.07
Councils and delegations	1,647.11
Pay of agents and subagents	39,850.89
Pay of interpreters	13,387.02
Pay and expenses of Indian police	349,413.09
Burial of Indians	574.91
Telephone lines	3,867.88
Boats, docks, etc.	249.00
Investigating land frauds	31,434.55
Drainage	24.50
Indian houses	319.67
Hospitals and equipment	23,048.79
[fol. 35] Care of indigent Indians	377.75
Payments to Minnesota public school system	5,302.22
Roads	4,239.30
Bridges	152.00
Pay of farmers	97,582.26
Expenses of Chippewa Commission	546.08
Pay of Indian judges	9,822.13
Clothing	112.50
Suppression of liquor traffic	23,761.03
	<hr/>
	2,426,834.44

No part of the aforesaid sum of \$2,426,834.44 has been reimbursed to the United States.

20. During the period July 1, 1927, to June 30, 1934, the United States, although under no obligation so to do, expended out of public funds for the benefit of the Chippewa Indians of Minnesota under other than treaty appropriations the sum of \$372,165.64, no part of which has been reimbursed to the United States, and for the purposes and in the amounts shown by the following table:

Agency buildings and repairs	\$39,145.09
Agricultural aid	2,068.87
Agricultural implements and equipment	9.36
Automobiles and repairs	5,868.28
Burial of Indians	156.48
Care of indigent Indians	82.52
Education	63,771.63
Expenses, care and sale of timber	457.80
Fuel and light	49.33
Hardware, glass, oils, and paints	505.65
Hospitals and equipment	1,461.49
Medical attention	3,998.72
Miscellaneous agency expenses	3,536.94
Miscellaneous employees	58,852.12
Pay and expenses of field nurses	36,884.65
Pay and expenses of Indian police	36,996.11
Pay of Indian judges	1,081.57
Payments to Minnesota public school systems	12,545.73
Provisions and other rations	1,358.54
Roads	24,760.05
Suppression of liquor traffic	14.59
Surveying, allotting, sale, etc., lands	3.43
Transportation, etc., of supplies	72,539.91
Transportation of Indians	16.78
	<hr/>
	372,165.64

[fol. 36] 21. During the years indicated in the following ten tables the United States supported, maintained, and operated non-reservation Indian schools at Carlisle, Pennsylvania; Chemawa, Oregon (Salem Indian School); Chillico, Oklahoma; Fort Totten, North Dakota; Genoa, Nebraska; Lawrence, Kansas (Haskell Institute); Pierre, South Dakota; Pipestone, Minnesota; Tomah, Wisconsin;



and Wahpeton, North Dakota; and the United States, although under no legal obligation to do so, supported and educated therein children of the Chippewa Indians of Minnesota at a cost, based on the percentage of Chippewa Indian children to the total attendance of all Indian children, of \$1,457,918.52. No part of that sum has been reimbursed to the United States.

### Carlisle Indian School

Year	Attendance			Per cent Chippewa Indians of Minnesota to total attendance	Amount disbursed except cost of build- ings	Amount chargeable to Chip- pewa Indians of Minnesota
	Chip- pewa Indians of Min- nesota	Other Indians	Total			
1891.....	1	837	838	0.001193	\$105,695.56	\$126.09
1892.....	5	829	834	.000695	103,651.47	631.30
1893.....	3	787	790	.003797	103,103.38	399.09
1894.....	2	745	747	.002677	102,861.97	275.38
1895.....	4	784	788	.003076	102,722.88	321.77
1896.....	2	798	800	.0025	101,030.67	252.55
1897.....	1	816	816	.001225	106,158.54	130.04
1898.....	2	895	897	.002229	111,247.90	247.97
1899.....	2	925	927	.003157	112,462.20	242.58
1900.....	2	1,044	1,046	.001912	129,238.50	247.10
1901.....	2	1,042	1,044	.001915	131,822.66	252.44
1902.....	1	1,071	1,072	.000933	144,794.45	135.09
1903.....	1	1,073	1,074	.000931	145,186.32	135.16
1904.....	1	1,069	1,070	.000934	145,159.41	135.57
1905.....	1	982	983	.001040	146,417.96	153.59
1906.....	2	999	1,001	.001998	146,926.94	293.56
1907.....	2	1,007	1,009	.001982	150,255.19	295.90
1908.....	1	1,004	1,005	.000995	156,229.36	155.44
1910.....	7	1,006	1,013	.006910	151,091.70	1,044.04
1911.....	32	1,038	1,070	.029906	141,548.35	4,233.14
1912.....	32	813	852	.045774	151,789.33	6,943.45
1913.....	31	890	921	.037304	145,908.94	5,442.98
1914.....	16	792	808	.019801	147,262.58	2,915.94
1915.....	10	655	665	.015037	142,998.74	2,150.27
1916.....	5	540	545	.009174	140,371.56	1,287.76
1917.....	4	394	398	.010050	141,057.70	1,417.62
1918.....	1	149	150	.006666	147,029.23	980.09
Total.....						31,035.98

(fol. 37)

### Salem Indian School, Chemawa, Oreg.

1926.....	6	902	908	0.006607	\$182,739.34	\$1,207.35
1927.....	8	1,069	1,077	.007428	237,720.50	1,765.78
1928.....	3	978	981	.003058	240,581.90	735.09
1929.....	2	670	672	.002976	229,398.33	690.28
1930.....	1	751	752	.001329	223,031.36	309.69
1931.....	1	811	812	.001231	271,841.25	334.63
1932.....	2	730	732	.002732	271,416.62	741.51
1933.....	4	855	859	.004644	213,331.89	1,064.71
Total.....						7,129.64

### Chilocco Indian School

1908.....	10	605	615	0.016260	\$134,106.00	\$2,180.57
-----------	----	-----	-----	----------	--------------	------------

## Fort Totten Indian School

## Attendance

Year	Chippewa Indians of Min- nesota	Other Indians	Total	Per cent Chippewa Indians of Minnesota to total attendance	Amount disbursed except cost of build- ings	Amount chargeable to Chip- pewa Indians of Minnesota
1928.....	2	273	275	0.007272	\$31,617.91	\$593.52
1929.....	6	325	331	.015196	84,255.50	1,527.21
1930.....	2	302	304	.006578	94,825.85	623.76
1931.....	4	311	315	.012698	108,580.85	1,378.75
1932.....	4	314	318	.012578	100,005.82	1,365.41
1933.....	5	289	294	.017006	75,768.65	1,288.52
Total.....						6,677.17

[fol. 38]

## Genoa Indian School

1913.....	32	323	355	0.090141	\$50,781.78	\$5,388.78
1914.....	21	331	352	.059656	72,676.44	4,335.58
1915.....	21	367	388	.054123	68,799.47	3,723.63
1916.....	20	363	383	.052219	70,901.04	3,702.38
1917.....	2	389	391	.005115	77,326.33	395.52
1918.....	4	346	350	.011428	80,185.36	916.35
1919.....	6	330	336	.017857	85,262.54	1,522.53
1920.....	5	382	387	.012919	102,124.05	1,319.34
1921.....	5	439	444	.011262	110,552.57	1,245.04
1922.....	4	361	365	.010959	108,262.26	1,186.44
1923.....	2	423	425	.004706	109,049.52	513.18
1924.....	1	480	481	.002079	103,538.69	215.25
1925.....	1	476	477	.002096	127,436.79	267.10
1926.....	1	490	491	.002	86,140.31	172.28
1928.....	2	541	543	.003683	134,124.57	493.98
1932.....	2	509	511	.003912	183,173.91	641.47
1933.....	5	550	555	.009009	159,416.64	1,436.18
Total.....						27,475.03

## Haskell Institute, Lawrence, Kans.

1926.....	3	944	947	0.003167	\$155,987.72	\$494.01
1927.....	5	982	987	.005170	211,564.83	1,093.79
1928.....	6	986	992	.006048	193,655.35	1,171.22
1929.....	5	937	942	.005307	218,801.13	1,161.17
1931.....	26	1,105	1,131	.022988	360,545.01	8,828.20
1932.....	26	1,089	1,065	.024413	320,464.29	7,823.49
1933.....	22	907	929	.023681	274,924.29	6,510.48
Total.....						26,542.36

[fol. 39]

## Pierre Indian School

1892.....	27	80	107	0.252336	\$25,505.96	\$6,451.21
1894.....	10	107	117	.085471	19,392.63	1,657.50
1895.....	30	84	114	.263158	17,003.70	4,424.65
1896.....	104	59	163	.638037	22,052.48	14,070.29
1897.....	103	27	130	.792307	25,471.90	20,181.56
1898.....	47	54	101	.465346	26,199.72	12,191.93
1899.....	74	77	151	.490066	26,680.47	13,075.19
1900.....	48	60	108	.444444	22,756.40	10,113.94
1901.....	64	77	141	.453901	20,869.25	9,472.57
1902.....	61	104	165	.369697	26,193.03	9,683.48
1903.....	35	65	100	.35	26,631.87	9,321.15
1904.....	24	116	140	.171429	27,893.73	4,781.79

## Pierre Indian School—Continued

## Attendance

Year	Chippewa Indians of Min- nesota	Other Indians	Total	Per cent Chippewa Indians of Minnesota to total attendance	Amount disbursed except cost of build- ings	Amount chargeable to Chip- pewa Indians of Minnesota
1905.....	15	186	151	.090387	27,379.76	2,709.86
1906.....	7	189	146	.047045	28,680.61	1,375.00
1907.....	4	149	153	.026144	26,065.71	733.74
1912.....	1	148	149	.006711	34,657.97	323.58
1913.....	1	194	195	.005128	34,661.84	177.74
1914.....	1	186	187	.005347	34,250.57	183.13
1915.....	1	235	236	.004237	42,728.59	181.04
1916.....	1	259	260	.003846	43,121.30	165.84
1917.....	1	223	223	.004484	42,811.67	191.06
1918.....	1	234	235	.004444	42,661.43	189.38
1921.....	1	359	360	.002777	128,851.32	357.83
1922.....	4	376	380	.010526	127,844.09	1,345.68
1923.....	4	325	329	.012158	100,687.36	1,224.16
Total.....						124,543.50

## Pipestone Indian School

1893.....	10	15	25	0.4	\$12,083.42	\$4,833.36
1894.....	28	36	64	.4375	12,148.55	5,314.99
1895.....	71	40	111	.639630	11,043.34	7,063.75
1896.....	114	21	135	.844444	11,408.81	9,634.10
1897.....	129	23	151	.854004	14,100.37	12,122.80
1898.....	131	16	147	.891156	15,376.02	13,702.43
1899.....	134	24	158	.848101	15,149.10	12,847.06
1900.....	120	26	146	.821917	16,905.41	13,894.84
1901.....	120	30	156	.769231	21,319.06	17,765.87
1902.....	148	40	188	.787234	13,037.99	10,255.60

[fol. 40]

1903.....	145	55	200	0.725	\$20,424.03	\$14,807.42
1904.....	152	70	222	.684684	22,616.36	15,485.05
1905.....	188	69	257	.731517	28,069.54	20,533.34
1906.....	229	54	283	.809157	40,741.35	32,067.37
1907.....	245	42	287	.853658	22,691.77	27,907.69
1908.....	218	62	280	.778571	26,396.83	20,892.32
1909.....	201	60	261	.770114	37,153.08	28,699.06
1910.....	185	57	242	.764622	26,012.17	27,629.03
1911.....	128	61	199	.638467	28,300.10	26,559.35
1912.....	186	88	274	.678333	38,960.03	26,436.95
1913.....	146	128	274	.530618	41,329.33	21,349.43
1914.....	144	134	278	.517985	42,852.48	22,166.04
1915.....	151	161	312	.483974	39,260.60	19,010.78
1916.....	121	153	274	.441606	39,975.85	17,653.53
1917.....	86	135	221	.389140	37,000.89	14,787.27
1918.....	66	176	242	.372727	39,087.82	10,652.12
1919.....	42	167	209	.200956	42,233.60	8,487.09
1920.....	39	188	227	.171806	52,296.84	8,985.25
1921.....	32	157	219	.146118	55,363.44	8,090.32
1922.....	27	160	217	.124423	52,361.00	6,514.91
1923.....	37	179	216	.171296	52,839.22	9,051.14
1924.....	48	174	222	.216216	50,368.34	10,888.25
1925.....	68	191	259	.263548	58,671.37	15,404.05
1926.....	64	208	272	.235294	54,222.80	12,788.29
1927.....	73	237	300	.243333	82,212.43	20,064.90
1928.....	69	250	319	.216300	83,379.39	18,034.94
1929.....	86	240	326	.263803	86,092.28	22,860.68

## Pipestone Indian School—Continued

Year	Attendance			Per cent Chippewa Indians of Minnesota to total attendance	Amount disbursed except cost of build- ings	Amount chargeable to Chip- pewa Indians of Minnesota
	Chip- pewa Indians of Min- nesota	Other Indians	Total			
1921.....	64	338	332	.251122	115,630.88	22,738.80
1922.....	111	217	338	.326414	108,230.80	35,636.71
1923.....	129	226	355	.363380	98,418.68	35,763.37
Total.....						710,052.44

## Tonah Indian School

1912.....	3	305	267	0.007400	\$44,864.75	\$336.03
1913.....	7	264	265	.003606	48,488.83	170.09
1915.....	11	257	263	.041044	46,223.14	1,807.18
1916.....	53	235	288	.184027	80,084.44	10,131.50
1919.....	52	256	308	.168821	61,663.10	10,410.64
1920.....	42	260	322	.129506	73,197.40	9,259.92
[fol. 41]						
1921.....	35	285	310	0.080645	\$78,592.81	\$6,338.11
1922.....	30	317	337	.059947	71,861.10	4,264.74
1923.....	37	379	316	.117088	71,535.80	8,375.96
1924.....	2	298	306	.006143	73,436.14	1,919.84
1925.....	1	346	347	.002881	77,384.01	222.94
1926.....	2	358	360	.005555	70,703.65	392.75
1929.....	39	335	374	.104278	101,615.24	10,596.23
1930.....	29	365	394	.073604	100,531.22	7,369.49
1931.....	21	369	390	.053846	137,104.99	7,382.55
1932.....	22	351	373	.058981	126,091.92	8,026.83
1933.....	11	317	328	.033536	114,637.82	3,864.54
Total.....						90,979.34

## Wahpeton Indian School, Wahpeton, N. Dak.

1909.....	14	31	45	0.311111	\$21,765.38	\$6,771.44
1910.....	14	27	41	.341463	14,391.44	6,621.45
1911.....	13	18	31	.419354	21,077.03	8,538.73
1912.....	38	53	91	.417582	19,366.80	8,087.01
1914.....	96	93	189	.507936	36,686.77	18,634.53
1919.....	47	140	187	.251336	44,193.15	11,107.32
1920.....	53	161	214	.247663	51,594.23	12,777.97
1921.....	53	158	211	.251184	65,349.73	16,414.80
1922.....	73	146	219	.333333	81,265.82	17,068.61
1923.....	83	123	216	.384257	49,871.80	19,163.58
1924.....	87	145	232	.375	54,014.75	20,255.53
1925.....	72	152	224	.321428	61,100.16	19,668.22
1926.....	87	144	231	.376623	50,054.20	18,851.56
1927.....	94	139	233	.403433	55,851.91	22,643.71
1929.....	113	238	351	.321957	92,501.86	29,779.76
1930.....	107	261	368	.290760	91,801.12	26,692.09
1931.....	113	249	362	.312154	125,405.13	39,145.74
1932.....	139	239	378	.367724	103,277.44	37,977.59
1933.....	160	204	364	.439560	96,645.16	42,431.34
1934.....	198	164	360	.544444	89,717.21	48,304.54
Total.....						431,332.49



[fol. 42]

## CONCLUSION OF LAW

Upon the foregoing special findings of fact, which are made a part of the judgment herein, the court decides as a conclusion of law that the plaintiffs are not entitled to recover, therefore the petition is dismissed.

## OPINION

WILLIAMS, Judge, delivered the opinion of the court:

The Chippewa Indians of Minnesota bring this suit under the act of May 14, 1926 (44 Stat. 555), as amended by the acts approved April 11, 1928 (45 Stat. 423), and June 18, 1934 (48 Stat. 979). The material provisions of the act of May 14, 1926, as amended, are set out in the Findings of Fact and need not be restated in detail here.

The plaintiffs in the amended petition assert two claims against the United States, (1) for the alleged appropriation of timber by the defendant for its own use, and (2) for the alleged appropriation of lands, both without any consideration to plaintiffs therefor, and in violation of the expressed terms of the trust created by agreements entered into by the defendant with the plaintiffs in conformity with the authority contained in the act of January 14, 1889 (25 Stat. 642).

The act of January 14, 1889, authorized the President to appoint commissioners to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except so much of the White Earth and Red Lake Reservations as in the judgment of the commission would be required to make and fill the allotments provided for in the Act, and not reserved by the commissioners for said purpose. The cessions were not to become effective until approved by the President, which approval, the Act declared, should "be deemed full and ample proof of the assent of the Indians and" should "operate as a complete extinguishment of the Indian title without any other or further Act or ceremony [fol. 43] whatsoever for the purpose and upon the terms in this act provided."

The terms of the cession as provided in the Act were:

Section 4 required the Commissioner of the General Land Office to cause all the ceded lands to be surveyed in the

manner provided by law for the survey of public lands, and directed the Secretary of the Interior to appoint competent and experienced examiners to personally make a careful, complete, and thorough examination of the said lands by 40 acre lots, for the purpose of ascertaining on which lots there was standing or growing pine timber, and to classify all such lots as "pine lands," and make due entry thereof in books provided for that purpose showing with particularity the amount and quality of all pine timber standing or growing on any lot so classified, the amount to be estimated in the manner usual in estimating such timber, and submit reports of their work to the Commissioner of the General Land Office. Thereupon the Commissioner was directed to make a list of all such "pine lands" describing each 40 acre lot separately, and opposite each such description to place the actual cash value of the lot (which should include the value of the land as well as all timber thereon) according to his best judgment and information, but in no event to fix the valuation of the lot at less than the value of the pine timber thereon computed at a rate not less than \$3.00 per thousand feet board measure. The lists so prepared were subject to the approval or rejection of the Secretary of the Interior, and if approved, fixed the minimum price for which each lot could be sold.

Secs. 4 and 6. All the ceded lands not classified as "pine lands" were directed to be classified as "agricultural lands" and disposed of under the Homestead Laws at \$1.25 per acre.

Sec. 5. All lands classified as "pine lands" when the listing thereof had been approved by the Secretary of the Interior as directed in Section 4, were directed to be proclaimed as in market, and each lot offered for sale separately, and after advertisement, as required by the Act, sold at public auction to the highest bidder for cash at not less than its appraised value.

[fol. 44] Sec. 7. The net proceeds received from all the ceded lands were directed to be placed "in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund; to draw interest at the rate of 5% per annum, payable annually for the period of 50 years, three-fourths of said interest to be paid annually to the Indians in cash and one-fourth to be expended for their education." At the expiration of the 50 year period the permanent fund was directed to be

"divided and paid to the said Indians and their issue then living, in cash in equal shares."

Commissioners were duly appointed in accordance with the act of January 14, 1889, and entered upon agreements of cession with all the bands and tribes of Chippewa Indians of Minnesota, in which they ceded all their lands in the State of Minnesota to the United States upon the terms stated in the act, and these agreements were approved by the President March 4, 1890, as required by the act.

It appears that the Chippewa Indians of Minnesota ceded all their lands in the State of Minnesota, and the timber thereon, to the United States upon the clearly defined trust declared in the act of January 14, 1889, which the United States was obligated to execute for the purposes set forth in the act, and to account to the Indians for the proceeds derived from such lands and timber upon their disposal.

The act of January 14, 1889, was first amended by the act of June 27, 1902 (32 Stat. 400). This act amended section 5 of the act of 1889, in the following respect: the pine timber was directed to be sold separate from the land; the Secretary was authorized, after advertisement, to receive bids for the timber on not exceeding 10 sections in any one bid; all sales were to be made upon separate sealed bids for the timber on each lot; no sale was to be approved for less than the minimum price of \$4.00 per thousand feet board measure for Norway pine and \$5.00 per thousand feet board measure for white pine; the Secretary was authorized to accept any, or reject all, bids; all timber sold was to be cut, banked, and scaled in the log according to Scribners' Rules, and paid for at the sale price per thousand feet, with the proviso, that [fol. 45] 200,000 acres of the ceded lands classified as "pine lands," and 5% of the pine timber standing thereon, should be reserved for forestry purposes, and that in addition thereto all lands and timber on 10 sections, and certain islands and points therein described should be likewise reserved from sale, for forestry purposes. When the merchantable pine timber on any tract classified as "pine lands" (except on the lands reserved for forestry purposes) was removed, the tract was to be opened to homestead entry and disposed of at \$1.25 per acre. When 95% of all the merchantable pine timber on any tract reserved for forestry purposes, except the 10 sections, islands, and points, was



ent, such tract was, without further act, resolution, or proclamation, to forthwith become and be a part of a forest reserve, the same as though set apart by proclamation of the President in accordance with the act of Congress approved March 3, 1891, and subsequent laws amending and supplementing the same.

The act of May 23, 1908 (35 Stat. 268), further amended the act of 1889 as amended by the act of 1902. Section 1 of this act created a national forest, describing the same by metes and bounds. The national forest so created included a part of the 200,000 acres of forestry lands selected by the Forester under the act of 1902 and the 10 sections, islands, and points, specifically referred to in that act, and "also 160 acres at the extremity of Sugar Point, on Leech Lake, and the peninsula known as Pine Point." By section 2 provision was made for the permanent withdrawal of all the lands described in the act, and all timber on the 10 sections, islands, and points for the reservation from sale of the 5% of the timber reserved by the act of June 27, 1902, and of 10% of the "merchantable pine timber" standing on the uncut portions of the reserved lands, outside of the 10 sections, islands, and points; and, for the sale by the Secretary of the Interior, from time to time, of so much of the timber on the 10 sections, islands, and points as the Forester might deem advisable in the conduct of a national forest, provided that a commission of three persons should "at once" be appointed, consisting of one person to be designated by the President, one by the Secretary of the Interior, and one by a general council of the Indians from four reservations [fol. 46] therein named. The proviso directed the commission to "proceed forthwith" to appraise the value of the 5% of merchantable pine timber reserved under the act of June 27, 1902, the 10% reserved under "this Act", and the timber upon the 10 sections, islands, and points, and to add to the value of said timber an amount equal to \$1.25 for each and every acre of land directed by "this Act" to be included in the reserve, and to certify their findings to the Secretary of the Interior. The Indians at the council, heretofore referred to, were authorized to select a representative, to serve without compensation, who was authorized, within 60 days after the commission certified its findings to the Secretary, to appeal therefrom to the President. The action of the President was made final, and the amount approved by him



we : directed to be certified by the Secretary of the Interior to the Secretary of the Treasury, and placed to the credit of all the Chippewas in the State of Minnesota in their trust fund, to draw interest at the rate of 5% per annum as provided in the act of January 14, 1889.

The commission authorized in section 2 of the act of 1908 to be "at once" appointed was not named until December 18, 1922. However, the Commissioner of Indian Affairs prior to that date, on July 29, 1922, designated a committee consisting of a representative of the Indian Office, a representative of the Forestry Service, and a Chippewa Indian, to make preliminary investigations of claims, both legal and equitable, of the Chippewa Indians, for the land and timber taken by the act of May 23, 1908.

On November 17, 1922, the committee filed its report with the Commissioner of Indian Affairs. Thereafter, on December 18, 1922, the three persons who composed the committee making preliminary investigation were regularly appointed and commissioned members of the commission to carry out the provisions of the act of May 23, 1908. The commission adopted and used as a basis for its findings the report of the committee, and on January 16, 1923, certified to the Secretary of the Interior an award as follows:

190,944.93 acres at \$1.25 .....	\$238,681.16
Values of all timber on 10 sections, islands and points .....	914,830.09
Value of 5 and 10% reserved timber .....	336,684.33
<hr/>	
Total award .....	\$1,490,195.58

[fol. 47] The award made by the commission was approved by the President and certified to the Secretary of the Treasury for payment, who on May 31, 1923, placed the amount of the award to the credit of the Chippewa Indians of Minnesota in their interest bearing trust fund.

The commission in its report stated that the values of the land and timber included in the award met the legal requirements of the act of May 23, 1908, but excluded equitable consideration of the following items set out in the report of the preliminary committee:

1. Mature pine timber on 18 parcels of land reserved within the national forest totaling 44,333 feet board measure, which could not be sold and for which provision should be made to pay the Indians, of the minimum value of ..... \$183.17
2. 90% of merchantable white and Norway pine timber on certain tracts included in the forest reserve which had erroneously been classified as "agricultural lands," aggregating 2,114,000 feet board measure, for which provision should be made for the proper advertisement and sale in order that the proceeds could be placed to the credit of the Indians, of the value of ..... 20,000.00
3. By reason of the long delay in settlement, the Indians had lost interest at the rate of 5% per annum for approximately 14 years on the value of 190,944.93 acres included in the reserve, and on the 5 and 10% of the merchantable pine timber standing on that portion of the 190,944.93 acres outside of the 10 sections, islands, and points, and recommended that remedial legislation be obtained from Congress allowing interest on said deferred payments, and which interest the commission found aggregated ..... 402,755.84
4. Merchantable white and Norway pine, less than 10" in diameter and jack pine, and hardwoods having a well defined and commercial value at the time of the appraisal, standing on that portion of the 190,944.93 acres outside of the 10 sections, islands and points, the value of which the commission recommended should be determined by careful estimate and appraisal and remedial legislation requested of Congress to pay the Indians therefor, and which value on the basis of superficial estimates and appraisals made by the commission, it fixed at approximately ..... 1,060,887.70

[fol. 48] By the act of February 28, 1925, 43 Stat. 1062, Congress authorized the appropriation of the sum of \$422,939.01 in full payment of the foregoing items 1, 2, and 3, and that amount was subsequently appropriated and credited to the plaintiffs' interest bearing trust fund in the Treasury of the United States, together with interest thereon from February 1, 1923, to May 26, 1926. No provision, however, was made by Congress for the payment of item 4, \$1,060,887.70, the estimated value as of the date of the appraisal of the white and Norway pines under ten inches in diameter and jack pine and hardwoods, and plaintiffs have at no time been compensated in respect to such timber. This item constitutes plaintiffs' first claim herein. It is conceded by the defendant that the timber in question had a value of the amount claimed at the time the lands and other timber included in the award were appraised by the commission under the act of May 23, 1908, and at the time the appraisal became final on the approval of the President, April 9, 1923.

The act of May 14, 1926, vests the court with jurisdiction to hear and render judgment "in any and all legal and equitable claims arising under or growing out of the act of January 14, 1889 (25 Stat. L. 642), or arising under or growing out of any subsequent act of Congress in relation to Indian Affairs which said Chippewa Indians of Minnesota may have against the United States." Section 4 of the act provides that "If it be determined by the court that the United States . . . has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation or disposal, together with interest . . . ." The plaintiffs contend that the lands and timber included in the national forest created by the act of May 23, 1908, were appropriated by the United States on April 9, 1923, the date on which the President approved the appraisals and award made by the commission appointed under the terms of that act, which they contend is the date fixed in the act upon which the lands and timber actually became a part of the national forest.

Plaintiffs' contention that the lands and timber included in the national forest were appropriated by the defendant [fo. 49] and actually became a part of the national forest

on April 9, 1923, is based solely on the provisions of section 5 of the act of 1908, which reads:

That all moneys received from the sale of timber from any of the lands set aside by this Act for a National Forest, prior to the appraisal herein provided for, including all moneys received for timber under sales made by the Secretary of the Interior as authorized by existing laws and section two of this Act, shall be placed to the credit of the Chippewa Indians in the State of Minnesota, as provided for in an Act of Congress entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine; and the Acts supplementary thereto, and shall draw interest at the rate of five per centum per annum, pursuant to the terms of said Acts; and after said appraisal the National Forest hereby created, as above described, shall be subject to all general laws and regulations from time to time governing national forests, so far as said laws and regulations may be applicable thereto.

We do not think the language of section 5 is susceptible to the construction plaintiffs place upon it. In the first place, the section uses the words, "the lands set aside by this Act as a national forest," and also, "the national forest hereby created." These words, as well as the words employed in section 1 of the act, "That there is hereby created in the State of Minnesota a national forest consisting of lands and territory described as follows: \* \* \*," are of the present tense and in the absence of other language in the act showing a contrary intent impel the conclusion that it was the intention of Congress to appropriate the lands included in the national forest and the timber growing thereon as of the date of the act, May 23, 1908, and not at some subsequent date. That this was the intention of Congress was further and, we think, conclusively shown by the fact that Congress provided for the payment of back interest for a period of 14 years on the 1908 value of the lands and the reserved merchantable pine. This action of Congress can not be explained or justified on any theory other than that Congress construed the act of May 23, 1908, as having effected an appropriation or taking of [fol. 50] plaintiffs' property as of the date of its approval.



When section 5 is read in connection with section 2 of the 1908 act which authorizes the Secretary of the Interior to proceed with the sale of certain of the merchantable pine timber on the lands included in the national forest, the provision that the moneys received for timber under sales made prior to the appraisal provided for in the act, shall be placed to the credit of the Chippewa Indians of Minnesota as provided for in the act of January 14, 1889, is in no way inconsistent with the view that the lands included in the national forest were appropriated by the United States and became Federal property in 1908. The Indians were entitled to payment for the value of the merchantable pine timber taken and it was immaterial whether made through sales or through an award after appraisal. The last clause has to do solely with the administration of the national forest, after the appraisal of the lands and timber provided for in the act has been made. Here again words of the present tense are used—"the national forest hereby created as above described." By no process of reasoning can the provision that the national forest created by the act of 1908 shall be subject to all general laws and regulations after the appraisal therein authorized had been made, be construed as establishing the date of the approval of the appraisal as the date of the taking or appropriation of plaintiffs' lands and timber. The repeated expressions of Congress, made in the present tense, must be construed as showing the intention of Congress to create a national forest as of the date of the act of May 23, 1908, and this was necessarily the date of the appropriation of plaintiffs' land and the timber thereon.

The property consisting of the lands and timber thereon included in the national forest was appropriated by the United States on May 23, 1908. Under the jurisdictional act the measure of plaintiffs' recovery is limited to the value of such lands and timber on the date of their appropriation. It is established in the record that the type of timber embraced in plaintiffs' first claim, white and Norway pine less than 10 inches in diameter, jack pine, poplar, white birch, yellow birch, oak, basswood, ash, elm, spruce, tamarack, balsam, and cedar, had no merchantable value on [fol. 51] May 23, 1908. The appraisal commission in a report to the Commissioner of Indian Affairs said in respect to this timber:

In his opinion of January 19, 1922, the Solicitor for the Department of Agriculture held that the use of the term "merchantable pine timber," in relation to lands other than the ten sections, islands and points, showed a clear intention on the part of Congress to allow the Indians compensation only for timber reserved from cutting which was merchantable at the time of the passage of the said Act of 1908. Since the preponderance of evidence was to the effect that the white and Norway pine under 10 inches in diameter, and jack pine and hardwoods of all diameters was not commonly regarded as merchantable in 1908, it was the belief of the said Solicitor that no allowance should be made for such classes of timber in determining the amounts to be paid to the Indians. The Solicitor of the Department of the Interior concurred in this view. Because of these opinions the Commission in determining the amounts due the Indians excluded from their appraisal all such timber standing upon lands cut over under the Acts of 1902 and 1908.

The Commission finds, however, that these classes of timber now possess well-defined and considerable commercial value, which as a matter of equity should be recognized by the Government; and, therefore, recommends that Congress be asked to enact legislation authorizing the appraisal of said timber and proper payment to the Indians therefor.

The volume and the exact value of such timber have not been determined by careful estimate and appraisal; but superficial estimates and appraisals conducted jointly by representatives of the Indian Service and of the Forest Service during the fall of 1922, resulted in finding the value thereof to be approximately \$1,060,887.70.

The plaintiffs and the defendant are now in substantial agreement that the estimated value placed on this timber by the commission was its approximate value on April 9, 1923, the date on which the President approved the appraisal and award of the commission. Since the timber involved in this claim had no merchantable value on the date plaintiffs' lands and property were appropriated, May 23, 1908, it is immaterial what value it may have had fourteen years later. The defendant was required to account to plaintiffs for the value of the timber at the time it was

[fol. 52] appropriated by the United States, and having had no ascertainable market value at that time, it is clear that plaintiffs are not entitled to recover in respect to such timber. Plaintiffs' first claim in suit is therefore disallowed.

The second claim in suit is for the value of 10,129.20 acres of land at \$1.25 per acre, or \$12,661.50, together with interest thereon at the rate of 5 per cent per annum from November 23, 1885, to the date of judgment.

The basis of the second claim is, that as a result of erroneous surveys approved June 21, 1872, December 14, 1875, and November 23, 1885, marking the exterior boundaries of the Red Lake Reservation, as fixed in the treaties of February 22, 1855, and October 2, 1863, there were mistakenly included within the boundaries of the reservation 31,933.96 acres of defendant's lands and mistakenly excluded therefrom 48,299.76 acres of land set aside by the treaty of October 2, 1863, for the use of the Indians, resulting in a loss to the Indians of 16,365.80 acres, which were appropriated by the Government to its own use and disposed of under the general homestead laws without any consideration therefor to plaintiffs. Plaintiffs' concede that in a settlement made with them under the act of February 9, 1925 (43 Stat. 816), for lands taken under the act of May 17, 1900 (31 Stat. 179), commonly known as the Free Homestead Act, they were paid at the rate of \$1.25 an acre for 6,236.60 acres in excess of the actual acreage taken under that Act. The claim presented, therefore, is for the difference between the 16,365.80 acres included by the treaties stated, within the boundaries of the Red Lake Reservation, which were mistakenly appropriated by the defendant as the result of erroneous surveys, and the 6,236.60 excess acreage for which plaintiffs were paid under the Free Homestead Act.

Plaintiffs do not allege in their amended petition of August 22, 1935, when this claim is for the first time asserted, that the claim arises or grows out of the act of January 14, 1889, or any subsequent act of Congress. On the contrary, as the following excerpt from the petition shows, the plaintiffs allege that the claim arose long prior to the act of January 14, 1889:



Prior to the adoption of the Act of January 14, 1889 (25 Stat. 642), the defendant, the United States, had assumed [fol. 53] to survey and establish the boundaries of the reservations in Minnesota occupied by the Chippewa Indians of Minnesota. In the making of such surveys and establishing of such boundaries errors occurred, as a result of which there were wrongfully excluded from the Indian reservations as the same had been established by prior treaties with the Indians, a total of 15,365.80 acres of lands, which lands the defendant, United States, in consequence of errors aforesaid, and prior to January 14, 1889, had disposed of under its public land laws without any credit to the Indians therefor.

The court's jurisdiction in this case is limited to "legal and equitable claims arising under or growing out of the act of January 14, 1889 . . . , or arising under or growing out of any subsequent Act of Congress" which the "Chippewa Indians of Minnesota may have against the United States." It is too clear for argument or for extended discussion that the claim now under consideration is outside the jurisdiction of the court, however meritorious it otherwise may be. The claim, therefore, will have to be disallowed.

#### Offsets

The jurisdictional act provides:

Sec. 3. In said suit or suits the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against the said Chippewa Indians, and any payment or payments which may have been made by the United States upon any claim against the United States by said Indians shall not operate as an estoppel, but may be pleaded as an offset in such suit or suits as may gratuities, if any, paid to or expended for said Indians subsequent to January 14, 1889.

The defendant contends that the disbursements set out in findings numbers 16 to 21, inclusive, constitute offsets within the meaning of the jurisdictional act. Plaintiffs contend that none of the expenditures referred to in these



findings form the basis for any offset herein. They contend that the claimed offsets include expenditures in maintaining the defendant's long established Indian service in policing the Indian country, and in educating and training the Indians in agricultural and other civilized pursuits; that such expenditures were made in accord with a long [fol. 54] established government policy and for the express purpose of ultimately changing the hereditary customs and habits of the tribes and that the expenditures were made only indirectly for the benefit, or jointly for their benefit and for the purposes of the Government, and do not constitute gratuities within the meaning of the jurisdictional act.

Both the plaintiffs and the defendant have earnestly urged their contentions in respect to the nature of the disbursements set out in the findings referred to, but inasmuch as plaintiffs are not entitled to recover on their claims against the United States there is nothing to offset in this suit, and a discussion and a determination by the court of the question as to whether these expenditures either in part or in whole would constitute offsets within the meaning of the jurisdictional act in case plaintiffs had been awarded a judgment would be of academic interest only, and would in no way affect the decision. Decision therefore in respect to the offsets claimed by the defendant will be deferred to such time as plaintiffs may present recoverable claims against the United States, if that occasion should arise.

Plaintiffs are not entitled to recover, and the petition, therefore, is dismissed. It is so ordered.

Whaley, Judge; Littleton, Judge; Green, Judge; and Booth, Chief Justice, concur.

[fol. 55]

#### EX. JUDGMENT

At a Court of Claims held at the City of Washington on the 31st day of May, A. D., 1938, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made a part of the judgment herein, the court decides, as a conclusion of law, that plaintiffs are not entitled to recover.

It is Therefore Adjudged and Ordered that the plaintiffs' petition be and the same is hereby dismissed.

[Vol. 56] X. AMENDMENT TO ORIGINAL JURISDICTION ACT  
APPROVED JUNE 22, 1936—Filed July 6, 1936

[Public Resolution—No. 121—47th Congress]

[H. J. Res. 415]

Joint Resolution

To carry out the intention of Congress with reference to the claims of the Chippewa Indians of Minnesota against the United States.

Whereas by the Special Jurisdictional Act approved May 14, 1926 (44 Stat. L. 555), the claims of the Chippewa Indians of Minnesota against the United States were referred to the Court of Claims "with right of appeal to the Supreme Court of the United States by either party as in other cases", it being the intention that both parties should have the right of appeal to the Supreme Court; and

Whereas the Supreme Court has since decided that notwithstanding such provision there is no right of appeal, in view of the Judicial Code, as amended, unless the Jurisdictional Act specifically provides that the Supreme Court shall review a case on appeal, anything in the Judicial Code to the contrary notwithstanding: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the claims of the Chippewa Indians of Minnesota under the said Jurisdictional Act of May 14, 1926, shall be reviewed by the Supreme Court of the United States on appeal from the Court of Claims, anything in the Judicial Code, or amendments thereto, notwithstanding: Provided, That in any case heretofore decided by the Court of Claims said appeal shall be perfected by either party to the controversy within one year from the passage of this resolution, and an appeal shall be taken in all cases hereafter decided by the Court of Claims within three months from and after the date final judgment or decree is entered therein in the Court of Claims.

Approved, June 22, 1936.

[fol. 57] **XI. PLAINTIFFS' PETITION FOR ALLOWANCE OF  
APPEAL UNDER JOINT RESOLUTION APPROVED JUNE  
22, 1936, (49 STATUTES AT LARGE 1826-7), AND  
ALLOWANCE OF SAME—Filed July 20, 1938**

To the Honorable, the Chief Justice and Associate Justices  
of the Court of Claims of the United States:

The above named plaintiffs, The Chippewa Indians of Minnesota, conceiving themselves aggrieved by the judgment of this Court, entered on the 12th day of January, 1938, in the above entitled cause, and, following the filing of "Motion for New Trial", was affirmed May 31, 1938, do hereby except to said judgment and appeal therefrom to the Supreme Court of the United States, as authorized in the Joint Resolution approved June 22, 1936, entitled "Joint Resolution to carry out the intention of Congress with reference to the claims of the Chippewa Indians of Minnesota against the United States" (49 Stat. L., 1826-7), on the ground that the Court of Claims, in its determination of said cause erred in each of the respects indicated in the following assignments of error, to-wit:

**I**

In holding that the appropriation by defendant of all lands and the timber embraced in the National Forest in Minnesota, (which included the timber in suit in the first claim), was effected by the Act of May 23, 1908 and as of the date of said act, and not as of the date when the timber was appraised, the appraisal approved by the President on [fol. 58] April 9, 1923, and payment was made.

**II**

In holding that the amount to which plaintiffs were entitled on account of the creation of the Minnesota National Forest was to be determined by the value of the property taken as of the date of the Act of May 23, 1908, and that in consequence plaintiffs were not entitled to recover for white and Norway pine under ten inches in diameter, jack-pine and hardwoods standing and growing on the lands taken, and which at the date of the approval of the appraisal by the President were of the fair value of \$1,060,887.70.

### III

In holding with reference to the second claim in suit that plaintiffs did not allege in their amended petition that the claim arose or grew out of the Act of January 14, 1889, and, further was not within the claims submitted to the court for determination by the Jurisdictional Act of May 14, 1926.

### IV

In holding as a conclusion of law that plaintiffs were not entitled to recover on either claim, and directing that plaintiffs petition be dismissed.

### V

In entering judgment dismissing plaintiffs' petition.

And plaintiffs pray that this appeal be allowed; that a true copy of the material parts of the record, proceedings and papers in said cause and upon which said judgment was based, duly authenticated under the hand and seal of the Clerk of this Court be transmitted to the Supreme Court of the United States, as provided by law, to the end that said judgment may be reversed and said cause remanded for further proceedings in accordance with the opinion of the Appellate Court.

(S.) Webster Ballinger, Holmes, Mayall, Reavill & Neimeyer, Attorneys for Petitioners.

[fol. 59]

#### ALLOWANCE OF APPEAL

The foregoing application for appeal is hereby allowed this 21st day of July, 1938.

Fenton W. Booth, Chief Justice

[fol. 60] Citation, in usual form, showing service on N. A. Townsend, filed July 20, 1938, omitted in printing.

[fol. 61] Clerk's certificate to foregoing transcript omitted in printing.



[fol. 62] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS UPON WHICH APPELLANTS REPLY AND  
DESIGNATION OF RECORD TO BE PRINTED—Filed August 2,  
1938

Come now appellants in the above entitled cause and adopt as their Statement of Points upon which they intend to rely in support of their appeal, the Assignments of Error set out in their Application for Appeal, which forms a part of the record, and state that the entire record as certified to this Court from the Court of Claims, is necessary for the consideration thereof, and the printing thereof is requested.  
Webster Ballinger, Holmes, Mayall, Reavill & Neimeyer, Counsel for Appellants.

Service of the above and foregoing Points Upon Which Appellants Reply and Designation of Record to be Printed, accepted this 23 day of July, 1938.

N. A. Townsend, Acting Solicitor General.

[fol. 63] [File endorsement omitted.]

Endorsed on cover: File No. 42,729. Court of Claims. Term No. 244. Chippewa Indians of Minnesota, Appellant, vs. The United States. Filed August 2, 1938. Term No. 244, O. T., 1938.





## INDEX.

### SUBJECT INDEX.

	Page.
Motion for leave to file statement as to jurisdiction	1
Statement as to jurisdiction	3
Statutory provision believed to sustain jurisdiction	3
Date of the judgment and of the allowance of the appeal	5
Exhibit "A"—Opinion of the Court of Claims	6

### CASE CITED.

<i>Chippewa Indians of Minnesota v. United States</i> , 301 U. S. 358	5
---	---

### \* STATUTES CITED.

Act of Congress of May 14, 1926 (44 Stat. L. 555)	4
Joint Resolution of Congress of June 22, 1936 (49 Stat. at L. 1826-7)	4





**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1938**

---

**No. 244**

---

**CHIPPEWA INDIANS OF MINNESOTA,**

*vs.*

*Appellants,*

**THE UNITED STATES,**

*Appellee.*

---

**MOTION FOR LEAVE TO FILE JURISDICTIONAL  
STATEMENT.**

---

Come now the appellants in the above entitled cause, the Chippewa Indians of Minnesota, by their attorneys, Webster Ballinger and Holmes, Mayall, Reavill & Neimeyer, and move the Court for leave to file the attached Statement as to Jurisdiction which was inadvertently not filed in the Court of Claims, and accordingly omitted from the record as certified to this Court by the Clerk of the Court of Claims.

WEBSTER BALLINGER,  
HOLMES, MAYALL, REAVILL &  
NEIMEYER,  
*Attorneys for Appellants,*

Service of copy of the above and foregoing Motion accepted this 2nd day of August, 1938.

WARNER W. GARDNER,  
*Acting Solicitor General.*



**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1938**

---

**No. 244**

---

**CHIPPEWA INDIANS OF MINNESOTA,**

*vs.*

*Appellants,*

**THE UNITED STATES,**

*Appellee.*

---

**APPEAL FROM THE COURT OF CLAIMS.**

---

**STATEMENT AS TO JURISDICTION.**

---

In support of their application for the allowance of an appeal from the judgment entered in the above entitled cause, appellants above named, in compliance with Rule 12 of the Rules of the Supreme Court of the United States, file this statement of the basis upon which it is contended that said Supreme Court has jurisdiction, upon such appeal, to review the judgment in question.

The statutory provision believed to sustain such jurisdiction is the Joint Resolution of Congress approved June 22, 1936, entitled "Joint Resolution to carry out the intention of Congress with reference to the claims of the Chippewa



Indians of Minnesota against the United States" (49 Stat. at L. 1826-7), which is as follows:

"Whereas by the Special Jurisdictional Act approved May 14, 1926 (44 Stat. L. 555), the claims of the Chippewa Indians of Minnesota against the United States were referred to the Court of Claims 'with right of appeal to the Supreme Court of the United States by either party as in other cases', it being the intention that both parties should have the right of appeal to the Supreme Court; and

"Whereas the Supreme Court has since decided that notwithstanding such a provision there is no right of appeal, in view of the Judicial Code, as amended, unless the Jurisdictional Act specifically provides that the Supreme Court shall review a case on appeal, anything in the Judicial Code to the contrary notwithstanding: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the claims of the Chippewa Indians of Minnesota under the said Jurisdictional Act of May 14, 1926, shall be reviewed by the Supreme Court of the United States on appeal from the Court of Claims, anything in the Judicial Code, or amendments thereto, notwithstanding: Provided, That in any case heretofore decided by the Court of Claims said appeal shall be perfected by either party to the controversy within one year from the passage of this joint resolution, and an appeal shall be taken in all cases hereafter decided by the Court of Claims within three months from and after the date final judgment or decree is entered therein in the Court of Claims."

This suit was brought and prosecuted in the Court of Claims under the Special Jurisdictional Act approved May 14, 1926 (44 Stat. L. 555), referred to in said Joint Resolution.

Jurisdiction in the Supreme Court to review said judgment upon appeal is believed to exist under the express

language of said Joint Resolution, and does not depend upon any determination as to the validity of any State statute, or any statute or treaty of the United States.

The case of *Chippewa Indians of Minnesota v. United States*, 301 U. S. 358, in which the appeal was allowed under the same statutory authority here invoked, and the case heard and decided by this Court, is believed to fully sustain the jurisdiction claimed.

The date of the final judgment sought to be reviewed is May 31, 1938. The date of presentation of the application for an appeal is July 20, 1938.

WEBSTER BALLINGER,

*Washington, D. C.,*

HOLMES, MAYALL, REAVILL AND

NEIMETER,

*Duluth, Minnesota,*

*Attorneys for the Chippewa*

*Indians of Minnesota,*

*Plaintiffs-Appellants.*

Service of a copy of the above and foregoing Jurisdictional Statement of Appellants accepted this 2nd day of August, 1938.

\_\_\_\_\_  
Solicitor General.

**EXHIBIT "A".****Opinion.**

**WILLIAMS, Judge,** delivered the opinion of the court:

The Chippewa Indians of Minnesota bring this suit under the act of May 14, 1926 (44 Stat. 555), as amended by the acts approved April 11, 1928 (45 Stat. 423), and June 18, 1934 (48 Stat. 979). The material provisions of the act of May 14, 1926, as amended, are set out in the Findings of Fact and need not be restated in detail here.

The plaintiffs in the amended petition assert two claims against the United States, (1) for the alleged appropriation of timber by the defendant for its own use, and (2) for the alleged appropriation of lands, both without any consideration to plaintiffs therefor, and in violation of the expressed terms of the trust created by agreements entered into by the defendant with the plaintiffs in conformity with the authority contained in the act of January 14, 1889 (25 Stat. 642).

The act of January 14, 1889, authorized the President to appoint commissioners to negotiate with all the different bands or tribes of Chippewa Indians in the State of Minnesota for the complete cession and relinquishment in writing of all their title and interest in and to all the reservations of said Indians in the State of Minnesota, except so much of the White Earth and Red Lake Reservations as in the judgment of the commission would be required to make and fill the allotments provided for in the Act, and not reserved by the commissioners for said purpose. The cessions were not to become effective until approved by the President, which approval, the Act declared, should "be deemed full and ample proof of the assent of the Indians and" should "operate as a complete extinguishment of the Indian title without any other or further Act or ceremony whatsoever for the purposes and upon the terms in this act provided."

The terms of the cession as provided in the Act were:

Section 4 required the Commissioner of the General Land Office to cause all the ceded lands to be surveyed in the manner provided by law for the survey of public lands, and

directed the Secretary of the Interior to appoint competent and experienced examiners to personally make a careful, complete, and thorough examination of the said lands by 40 acre lots, for the purpose of ascertaining on which lots there was standing or growing pine timber, and to classify all such lots as "pine lands," and make due entry thereof in books provided for that purpose showing with particularity the amount and quality of all pine timber standing or growing on any lot so classified, the amount to be estimated in the manner usual in estimating such timber, and submit reports of their work to the Commissioner of the General Land Office. Thereupon the Commissioner was directed to make a list of all such "pine lands" describing each 40 acre lot separately, and opposite each such description to place the actual cash value of the lot (which should include the value of the land as well as all timber thereon) according to his best judgment and information, but in no event to fix the valuation of the lot at less than the value of the pine timber thereon computed at a rate not less than \$3.00 per thousand feet board measure. The lists so prepared were subject to the approval or rejection of the Secretary of the Interior, and if approved, fixed the minimum price for which each lot could be sold.

Sec. 4 and 6. All the ceded lands not classified as "pine lands" were directed to be classified as "agricultural lands" and disposed of under the Homestead Laws at \$1.25 per acre.

Sec. 5. All lands classified as "pine lands" when the listing thereof had been approved by the Secretary of the Interior as directed in Section 4, were directed to be proclaimed as in market, and each lot offered for sale separately, and after advertisement, as required by the Act, sold at public auction to the highest bidder for cash at not less than its appraised value.

Sec. 7. The net proceeds received from all the ceded lands were directed to be placed "in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund; to draw interest at the rate of 5% per annum, payable annually for the period of 50 years, three-fourths of said interest to be paid annually to the Indians in cash and one-fourth to be expended for



their education." At the expiration of the 50 year period the permanent fund was directed to be "divided and paid to the said Indians and their issue then living, in cash in equal shares."

Commissioners were duly appointed in accordance with the act of January 14, 1889, and entered upon agreements of cession with all the bands and tribes of Chippewa Indians of Minnesota, in which they ceded all their lands in the State of Minnesota to the United States upon the terms stated in the act, and these agreements were approved by the President March 4, 1890, as required by the act.

It appears that the Chippewa Indians of Minnesota ceded all their lands in the State of Minnesota, and the timber thereon, to the United States upon the clearly defined trust declared in the act of January 14, 1889, which the United States was obligated to execute for the purposes set forth in the act, and to account to the Indians for the proceeds derived from such lands and timber upon their disposal.

The act of January 14, 1889, was first amended by the act of June 27, 1902 (32 Stat. 400). This act amended section 5 of the act of 1889, in the following respect: the pine timber was directed to be sold separate from the land; the Secretary was authorized, after advertisement, to receive bids for the timber on not exceeding 10 sections in any one bid; all sales were to be made upon separate sealed bids for the timber on each lot; no sale was to be approved for less than the minimum price of \$4.00 per thousand feet board measure for Norway pine and \$5.00 per thousand feet board measure for white pine; the Secretary was authorized to accept any, or reject all, bids; all timber sold was to be cut, banked, and scaled in the log according to Scribners' Rules, and paid for at the sale price per thousand feet, with the proviso, that 200,000 acres of the ceded lands classified as "pine lands," and 5% of the pine timber standing thereon, should be reserved for forestry purposes, and that in addition thereto all lands and timber on 10 sections, and certain islands and points therein described should be likewise reserved from sale, for forestry purposes. When the merchantable pine timber on any tract classified as "pine lands" (except on the lands reserved for forestry purposes) was removed, the

tract was to be opened to homestead entry and disposed of at \$1.25 per acre. When 95% of all the merchantable pine timber on any tract reserved for forestry purposes, except the 10 sections, islands, and points, was cut, such tract was, without further act, resolution, or proclamation, to forthwith become and be a part of a forest reserve, the same as though set apart by proclamation of the President in accordance with the act of Congress approved March 3, 1891, and subsequent laws amending and supplementing the same.

The act of May 23, 1908 (35 Stat. 268), further amended the act of 1889 as amended by the act of 1902. Section 1 of this act created a national forest, describing the same by metes and bounds. The national forest so created included a part of the 200,000 acres of forestry lands selected by the Forester under the act of 1902 and the 10 sections, islands, and points, specifically referred to in that act, and "also 660 acres at the extremity of Sugar Point, on Leech Lake, and the peninsula known as Pine Point." By section 2 provision was made for the permanent withdrawal of all the lands described in the act, and all timber on the 10 sections, islands, and points for the reservation from sale of the 5% of the timber reserved by the act of June 27, 1902, and of 10% of the "merchantable pine timber" standing on the uncut portions of the reserved lands, outside of the 10 sections, islands, and points; and, for the sale by the Secretary of the Interior, from time to time, of so much of the timber on the 10 sections, islands, and points as the Forester might deem advisable in the conduct of a national forest, provided that a commission of three persons should "at once" be appointed, consisting of one person to be designated by the President, one by the Secretary of the Interior, and one by a general council of the Indians from four reservations therein named. The proviso directed the commission to "proceed forthwith" to appraise the value of the 5% of merchantable pine timber reserved under the act of June 27, 1902, the 10% reserved under "this Act", and the timber upon the 10 sections, islands, and points, and to add to the value of said timber an amount equal to \$1.25 for each and every acre of land directly by "this Act" to be included in

the reserve, and to certify their findings to the Secretary of the Interior. The Indians at the council, heretofore referred to, were authorized to select a representative, to serve without compensation, who was authorized, within 60 days after the commission certified its findings to the Secretary, to appeal therefrom to the President. The action of the President was made final, and the amount approved by him was directed to be certified by the Secretary of the Interior to the Secretary of the Treasury, and placed to the credit of all the Chippewas in the State of Minnesota in their trust fund, to draw interest at the rate of 5% per annum as provided in the act of January 14, 1889.

The commission authorized in section 2 of the act of 1908 to be "at once" appointed was not named until December 18, 1922. However, the Commissioner of Indian Affairs prior to that date, on July 29, 1922, designated a committee consisting of a representative of the Indian Office, a representative of the Forestry Service, and a Chippewa Indian, to make preliminary investigations of claims, both legal and equitable, of the Chippewa Indians, for the land and timber taken by the act of May 23, 1908.

On November 17, 1922, the committee filed its report with the Commissioner of Indian Affairs. Thereafter, on December 18, 1922, the three persons who composed the committee making preliminary investigation were regularly appointed and commissioned members of the commission to carry out the provisions of the act of May 23, 1908. The commission adopted and used as a basis for its findings the report of the committee, and on January 16, 1923, certified to the Secretary of the Interior an award as follows:

190,944.93 acres at \$1.25	\$238,681.16
Value of all timber on 10 sections, islands and points	914,830.09
Value of 5 and 10% reserved timber	336,684.33
Total award	1,490,195.58

The award made by the commission was approved by the President and certified to the Secretary of the Treasury for payment, who on May 31, 1923, placed the amount of the



award to the credit of the Chippewa Indians of Minnesota in their interest bearing trust fund.

The commission in its report stated that the values of the land and timber included in the award met the legal requirements of the act of May 23, 1908, but excluded equitable consideration of the following items set out in the report of the preliminary committee:

1. Mature pine timber on 18 parcels of land reserved within the national forest totaling 44,333 feet board measure, which could not be sold and for which provision should be made to pay the Indians, of the minimum value of ..... \$183.17
2. 90% of merchantable white and Norway pine timber on certain tracts included in the forest reserve which had erroneously been classified as "agricultural lands," aggregating 2,114,000 feet board measure, for which provision should be made for the proper advertisement and sale in order that the proceeds could be placed to the credit of the Indians, of the value of ..... 20,000.00
3. By reason of the long delay in settlement, the Indians had lost interest at the rate of 5% per annum for approximately 14 years on the value of 190,944.93 acres included in the reserve, and on the 5 and 10% of the merchantable pine timber standing on that portion of the 190,944.93 acres outside of the 10 sections, islands, and points, and recommended that remedial legislation be obtained from Congress allowing interest on said deferred payments, and which interest the commission found aggregated ..... 402,755.84
4. Merchantable white and Norway pine, less than 10" in diameter and jack pine, and hardwoods having a well defined and commercial value at the time of the appraisal, standing on that portion of the 190,944.93



acres outside of the 10 sections, islands and points, the value of which the commission recommended should be determined by careful estimate and appraisal and remedial legislation requested of Congress to pay the Indians therefor, and which value on the basis of superficial estimates and appraisals made by the commission, it fixed at approximately ..... 1,060,887.70

By the act of February 28, 1925, 43 Stat. 1052, Congress authorized the appropriation of the sum of \$422,939.01 in full payment of the foregoing items 1, 2, and 3, and that amount was subsequently appropriated and credited to the plaintiffs' interest bearing trust fund in the Treasury of the United States, together with interest thereon from February 1, 1923, to May 26, 1926. No provision, however, was made by Congress for the payment of item 4, \$1,060,887.70, the estimated value as of the date of the appraisal of the white and Norway pines under ten inches in diameter and jack pine and hardwoods, and plaintiffs have at no time been compensated in respect to such timber. This item constitutes plaintiffs' first claim herein. It is conceded by the defendant that the timber in question had a value of the amount claimed at the time the lands and other timber included in the award were appraised by the commission under the act of May 23, 1908, and at the time the appraisal became final on the approval of the President, April 9, 1923.

The act of May 14, 1926, vests the court with jurisdiction to hear and render judgment "in any and all legal and equitable claims arising under or growing out of the act of January 14, 1889 (25 Stat. L. 642), or arising under or growing out of any subsequent act of Congress in relation to Indian Affairs which said Chippewa Indians of Minnesota may have against the United States." Section 4 of the act provides that "If it be determined by the court that the United States . . . has unlawfully appropriated or disposed of any money or other property belonging to the Indians, damages therefor shall be confined to the value of the money or other property at the time of such appropriation or dis-

posul, together with interest \* \* \*." The plaintiffs contend that the lands and timber included in the national forest created by the act of May 23, 1908, were appropriated by the United States on April 9, 1923, the date on which the President approved the appraisals and award made by the commission appointed under the terms of that act, which they contend is the date fixed in the act upon which the lands and timber actually became a part of the national forest.

Plaintiffs' contention that the lands and timber included in the national forest were appropriated by the defendant and actually became a part of the national forest on April 9, 1923, is based solely on the provisions of section 5 of the act of 1908, which reads:

That all moneys received from the sale of timber from any of the lands set aside by this Act for a National Forest, prior to the appraisal herein provided for, including all moneys received for timber under sales made by the Secretary of the Interior as authorized by existing laws and section two of this Act, shall be placed to the credit of the Chippewa Indians in the State of Minnesota, as provided for in an Act of Congress entitled "An Act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine; and the Acts supplementary thereto, and shall draw interest at the rate of five per centum per annum, pursuant to the terms of said Acts; and after said appraisal the National Forest hereby created, as above described, shall be subject to all general laws and regulations from time to time governing national forests, so far as said laws and regulations may be applicable thereto.

We do not think the language of section 5 is susceptible to the construction plaintiffs place upon it. In the first place, the section uses the words, "the lands set aside by this Act as a national forest," and also, "the national forest hereby created." These words, as well as the words employed in section 1 of the act, "That there is hereby created in the State of Minnesota a national forest consisting of lands and territory described as follows: \* \* \*" are of the present

tense and in the absence of other language in the act showing a contrary intent impel the conclusion that it was the intention of Congress to appropriate the lands included in the national forest and the timber growing thereon as of the date of the act, May 23, 1908, and not at some subsequent date. That this was the intention of Congress was further and, we think, conclusively shown by the fact that Congress provided for the payment of back interest for a period of 14 years on the 1908 value of the lands and the reserved merchantable pine. This action of Congress can not be explained or justified on any theory other than that Congress construed the act of May 23, 1908, as having effected an appropriation or taking of plaintiffs' property as of the date of its approval. When section 5 is read in connection with section 2 of the 1908 act which authorizes the Secretary of the Interior to proceed with the sale of certain of the merchantable pine timber on the lands included in the national forest, the provision that the moneys received for timber under sales made prior to the appraisal provided for in the act, shall be placed to the credit of the Chippewa Indians of Minnesota as provided for in the act of January 14, 1889, is in no way inconsistent with the view that the lands included in the national forest were appropriated by the United States and became Federal property in 1908. The Indians were entitled to payment for the value of the merchantable pine timber taken and it was immaterial whether made through sales or through an award after appraisal. The last clause has to do solely with the administration of the national forest, after the appraisal of the lands and timber provided for in the act has been made. Here again words of the present tense are used—"the national forest hereby created as above described." By no process of reasoning can the provision that the national forest created by the act of 1908 shall be subject to all general laws and regulations after the appraisal therein authorized had been made, be construed as establishing the date of the approval of the appraisal as the date of the taking or appropriation of plaintiffs' lands and timber. The repeated expressions of Congress, made in the present tense, must be construed as showing the intention of Congress to create a national forest as of

the date of the act of May 23, 1908, and this was necessarily the date of the appropriation of plaintiffs' land and the timber thereon.

The property consisting of the lands and timber thereon included in the national forest was appropriated by the United States on May 23, 1908. Under the jurisdictional act the measure of plaintiffs' recovery is limited to the value of such lands and timber on the date of their appropriation. It is established in the record that the type of timber embraced in plaintiffs' first claim, white and Norway pine less than 10 inches in diameter, jack pine, poplar, white birch, yellow birch, oak, basswood, ash, elm, spruce, tamarack, balsam, and cedar, had no merchantable value on May 23, 1908. The appraisal commission in a report to the Commissioner of Indian Affairs said in respect to this timber:

In his opinion of January 19, 1922, the Solicitor for the Department of Agriculture held that the use of the term "merchantable pine timber," in relation to lands other than the ten sections, islands and points, showed a clear intention on the part of Congress to allow the Indians compensation only for timber reserved from cutting which was merchantable at the time of the passage of the said Act of 1908. Since the preponderance of evidence was to the effect that the white and Norway pine under 10 inches in diameter, and jack pine and hardwoods of all diameters was not commonly regarded as merchantable in 1908, it was the belief of the said Solicitor that no allowance should be made for such classes of timber in determining the amounts to be paid to the Indians. The Solicitor of the Department of the Interior concurred in this view. Because of these opinions the Commission in determining the amounts due the Indians excluded from their appraisal all such timber standing upon lands cut over under the Acts of 1902 and 1908.

The Commission finds, however, that these classes of timber now possess well-defined and considerable commercial value, which as a matter of equity should be recognized by the Government; and, therefore, recommends that Congress be asked to enact legislation au-



thorizing the appraisal of said timber and proper payment to the Indians therefor.

The volume and the exact value of such timber have not been determined by careful estimate and appraisal; but superficial estimates and appraisals conducted jointly by representatives of the Indian Service and of the Forest Service during the fall of 1922, resulted in finding the value thereof to be approximately \$1,060,887.70.

The plaintiffs and the defendant are now in substantial agreement that the estimated value placed on this timber by the commission was its approximate value on April 9, 1923, the date on which the President approved the appraisal and award of the commission. Since the timber involved in this claim had no merchantable value on the date plaintiffs' lands and property were appropriated, May 23, 1908, it is immaterial what value it may have had fourteen years later. The defendant was required to account to plaintiffs for the value of the timber at the time it was appropriated by the United States, and having had no ascertainable market value at that time, it is clear that plaintiffs are not entitled to recover in respect to such timber. Plaintiffs' first claim in suit is therefore disallowed.

The second claim in suit is for the value of 10,129.20 acres of land at \$1.25 per acre, or \$12,661.50, together with interest thereon at the rate of 5 percent per annum from November 23, 1885, to the date of judgment.

The basis of the second claim is, that as a result of erroneous surveys approved June 21, 1872, December 14, 1875, and November 23, 1885, marking the exterior boundaries of the Red Lake Reservation, as fixed in the treaties of February 22, 1855, and October 2, 1863, there were mistakenly included within the boundaries of the reservation 31,933.96 acres of defendant's lands and mistakenly excluded therefrom 48,299.76 acres of land set aside by the treaty of October 2, 1863, for the use of the Indians, resulting in a loss to the Indians of 16,365.80 acres, which were appropriated by the Government to its own use and disposed of under the general homestead laws without any consideration therefor to plaintiffs. Plaintiffs concede that in a settle-

ment made with them under the act of February 9, 1925 (43 Stat. 816), for lands taken under the act of May 17, 1900 (31 Stat. 179), commonly known as the Free Homestead Act, they were paid at the rate of \$1.25 an acre for 6,236.60 acres in excess of the actual acreage taken under that Act. The claim presented, therefore, is for the difference between the 16,365.80 acres included by the treaties stated, within the boundaries of the Red Lake Reservation, which were mistakenly appropriated by the defendant as the result of erroneous surveys, and the 6,236.60 excess acreage for which plaintiffs were paid under the Free Homestead Act.

Plaintiffs do not allege in their amended petition of August 22, 1935, when this claim is for the first time asserted, that the claim arises or grows out of the act of January 14, 1889, or any subsequent act of Congress. On the contrary, as the following excerpt from the petition shows, the plaintiffs allege that the claim arose long prior to the act of January 14, 1889:

Prior to the adoption of the Act of January 14, 1889 (25 Stat. 642), the defendant, the United States, had assumed to survey and establish the boundaries of the reservations in Minnesota occupied by the Chippewa Indians of Minnesota. In the making of such surveys and establishing of such boundaries errors occurred, as a result of which there were wrongfully excluded from the Indian reservations as the same had been established by prior treaties with the Indians, a total of 16,365.80 acres of lands, which lands the defendant, United States, in consequence of errors aforesaid, and prior to January 14, 1889, had disposed of under its public land laws without any credit to the Indians therefor.

The court's jurisdiction in this case is limited to "legal and equitable claims arising under or growing out of the act of January 14, 1889 . . . or arising under or growing out of any subsequent Act of Congress" which the "Chippewa Indians of Minnesota may have against the United States." It is too clear for argument or for extended discussion that the claim now under consideration is out-

side the jurisdiction of the court, however meritorious it otherwise may be. The claim, therefore, will have to be disallowed.

#### OFFSETS

The jurisdictional act provides:

SEC. 3. In said suit or suits the court shall also hear, examine, consider, and adjudicate any claims which the United States may have against the said Chippewa Indians, and any payment or payments which may have been made by the United States upon any claim against the United States by said Indians shall not operate as an estoppel, but may be pleaded as an offset in such suit or suits as may gratuities, if any, paid to or expended for said Indians subsequent to January 14, 1899.

The defendant contends that the disbursements set out in findings numbers 16 to 21, inclusive, constitute offsets within the meaning of the jurisdictional act. Plaintiffs contend that none of the expenditures referred to in these findings form the basis for any offset herein. They contend that the claimed offsets include expenditures in maintaining the defendant's long established Indian service in policing the Indian country, and in educating and training the Indians in agricultural and other civilized pursuits; that such expenditures were made in accord with a long established government policy and for the express purpose of ultimately changing the hereditary customs and habits of the tribes and that the expenditures were made only indirectly for the benefit, or jointly for their benefit and for the purposes of the Government, and do not constitute gratuities within the meaning of the jurisdictional act.

Both the plaintiffs and the defendant have earnestly urged their contentions in respect to the nature of the disbursements set out in the findings referred to, but inasmuch as plaintiffs are not entitled to recover on their claims against the United States there is nothing to offset in this suit, and a discussion and a determination by the court of the question as to whether these expenditures either

in part or in whole would constitute offsets within the meaning of the jurisdictional act in case plaintiffs had been awarded a judgment would be of academic interest only, and would in no way affect the decision. Decision therefore in respect to the offsets claimed by the defendant will be deferred to such time as plaintiffs may present recoverable claims against the United States, if that occasion should arise.

Plaintiffs are not entitled to recover, and the petition, therefore, is dismissed. It is so ordered.

WHALEY, *Judge*; LITTLETON, *Judge*; GREEN, *Judge*; and BOOTH, *Chief Justice*, concur.

(6869)





FILE COPY

Office - Supreme Court, U. S.

FILED

OCT 27 1938

CHARLES ELMORE OSBORN  
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

---

No. 244

---

THE CHIPPEWA INDIANS OF MINNESOTA,  
*Appellants,*

*vs.*

THE UNITED STATES,  
*Appellee.*

---

APPELLANTS' BRIEF.

---

WEBSTER BALLINGER,  
HOLMES, MAYALL, REAVILL AND  
NEIMEYER,  
*Counsel for Appellants.*



## INDEX.

### SUBJECT INDEX.

	Page
Appellants' brief .....	1
Opinion below .....	1
Parties here and below .....	1
Jurisdiction .....	1
Statement of the case .....	2
The claims in suit .....	2
Appellee's traverse .....	3
Hearings, special findings of fact, conclusions of law, and opinion .....	3
The basic facts found by the court or shown by public records, upon which appellants rely .....	3
The express trust created by the Act of January 14, 1889 and agreements .....	3
The first claim in suit .....	5
Facts upon which second claim is asserted .....	17
Assignments of error .....	17
Questions for decision .....	18
Summary of argument .....	19
Argument .....	20
First question .....	20
Construction of 1908 Act .....	21
Reasons given by court below for its ruling .....	25
Construction of 1908 Act by appellee's officers .....	24
The second question .....	29
The third question .....	30
Set-offs .....	32
Conclusion .....	32

### TABLE OF CASES CITED.

<i>Brown v. U. S.</i> , 263 U. S. 78, at 87-88 .....	30
<i>Brooks-Scanlon Corp. v. U. S.</i> , 265 U. S. at 123 .....	24
<i>Chippewa Indians v. U. S.</i> , 301 U. S. 358, at 376 .....	21
<i>Edwards v. Darby</i> , 12 Wheat. 206, at 210 .....	25



<i>Helvering v. New York Trust Co.</i> , 292 U. S. 444 at 464	Page 21
<i>Monongahela Nav. Co. v. U. S.</i> , 148 U. S. at 324-8	30
<i>Seaboard Air Line R. Co. v. U. S.</i> , 261 U. S. 294 at 304	30
<i>Shoshone Tribe v. U. S.</i> , 299 U. S. 476 at 497	30
<i>U. S. v. North American Transp. &amp; Trading Co.</i> , 253 U. S. 330, at 333-4	24
<i>U. S. v. Moore</i> , 95 U. S. 763	25

## STATUTES CITED.

Act of January 14, 1889 (25 Stat. 642)	3
Act of June 27, 1902	5
Act of May 23, 1908 (35 Stat. at L., 268)	21

**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1936**

---

**No. 244**

---

**THE CHIPPEWA INDIANS OF MINNESOTA,**  
*Appellants,*

*vs.*

**THE UNITED STATES,**  
*Appellee.*

---

**APPELLANTS' BRIEF.**

---

**Opinion Below.**

The opinion of the Court of Claims appears in the record at pages 36-48.

**Parties Here and Below.**

Appellants were plaintiffs, and appellee was defendant in the court below, and will hereinafter be referred to as "appellants" and "appellee".

**Jurisdiction.**

The basis of jurisdiction of this Court is the Joint Resolution approved June 22, 1936 (R. 49).

### Statement of the Case.

Petition was filed in the Court of Claims under the authority contained in the Special Jurisdictional Act approved May 14, 1926 (44 Stat. L. 555), as amended by the Acts of April 11, 1928 (45 Stat. L. 423) and June 18, 1934 (48 Stat. L. 979), the pertinent portions of which are set out in Finding 1, (R. 12-14). By said Act, as amended, (Sec. 1), jurisdiction was conferred on the Court of Claims to hear and render final judgment in any and all "legal and equitable" claims, arising under or growing out of the Act of January 14, 1889 (25 Stat. L. 342), or any subsequent acts of Congress in relation to Indian Affairs, the Chippewa Indians of Minnesota might have against the United States. Section 4 provides that if the Court finds that the United States, in violation of the terms and provisions of any "law, treaty or agreement as provided in section 1 hereof, has unlawfully appropriated or disposed of any" property of the Indians, damages shall be confined to the "value of the . . . property at the time of such appropriation or disposal, together with interest at five per centum per annum from the date thereof."

Thereafter, and by leave of Court, appellee filed an amended petition (R. 1).

### The Claims in Suit.

The petition asserts two claims against appellee: (1) (Pet. pars. 4, 5, 6, R. 5-9) for the alleged appropriation of appellants' timber by appellee for its own use and (2) (Pet. par. 7, R. 9), for the alleged disposal of appellants' lands; both without any consideration to appellants therefor, and in violation of the terms of an express trust (Pet. pars. 2, 3, R. 2-5).

### **Appellee's Traverse.**

To appellants' amended petition, appellee filed a General Traverse (R. 10).

### **Hearings, Special Findings of Fact, Conclusions of Law, and Opinion.**

The case came on for hearing on the merits, and was argued and submitted (R. 10). Five months later the Court, of its own motion, remanded the case to its calendar for oral argument on the items claimed by appellee as set-offs (R. 10). Thereafter the case came on for hearing on the set-offs, was argued and submitted and thereafter the Court made and filed Special Findings of Fact (R. 12-35), Conclusion of Law (R. 36), and its Opinion, in conformity with which judgment was entered dismissing Appellants petition (R. 36-48). Both parties filed motions for new trial and amended findings (R. 11), and the Court thereafter filed an order and memorandum (R. 11), allowing one amendment to the Special Findings of Fact requested by appellee, and with that exception, denied all other requests for amended findings and overruled both motions for new trial.

### **The Basic Facts Found by the Court or Shown by Public Records, Upon Which Appellants Rely.**

#### ***The Express Trust Created by the Act of January 14, 1889 and Agreements.***

The Act of January 14, 1889, presented a proposal to all the tribes or bands of Chippewa Indians in Minnesota "for the complete cession and relinquishment" to appellee upon an express trust "of all their title and interest in and to all the reservations of said Indians in the State of Minnesota", except certain lands to be reserved for allotment.



purposes (R. 14, F. 4, Op., R. 38). The lands to which the Indian title was to be ceded were, by the express terms of the Act (R. 15, F. 6), to be by appellee, (1) surveyed and divided into 40 acre lots; (2) all lots upon which "there was standing or growing pine timber" were to be classified as "pine lands"; (3) the quantity and value of all pine timber standing or growing on any lot so classified was to be ascertained and determined; (4) a list was to be made containing a description of each 40 acre lot classified as "pine land", and opposite each such description was to be placed the actual cash value of the lot (which should include the value of the land as well as all timber thereon), but in no event was the valuation of the lot to be fixed at less than the value of the pine timber thereon computed at a rate not less than \$3.00 per thousand feet board measure; (5) the lists so prepared were to be subject to approval by appellee's Secretary of the Interior, and if approved, fixed the minimum price for which each lot could be sold; (6) each such 40 acre tract, when the listing thereof had been approved, was to be offered for sale at public auction, and sold, at not less than its appraised value, to the highest bidder, for cash; (7) all lands, not classified as "pine lands" were to be classified as "agricultural lands", and disposed of under the Homestead laws at \$1.25 per acre; and (8) the net proceeds received from all ceded lands were to be deposited "in the Treasury of the United States to the credit of all the Chippewa Indians in the State of Minnesota as a permanent fund" which was to draw interest at the rate of five per cent per annum, payable annually, for the period of fifty years, three-fourths of said interest to be paid annually to the Indians in cash, and one-fourth to be expended for their education; at the expiration of the fifty year period, the permanent fund was to be divided and "paid to the said Indians and their issue then living, in cash, in equal shares". All agreements were to be ap-

proved by the President before taking effect, and the Presidential approval, the Act declared, "shall be deemed full and ample proof of the assent of the Indians, and shall operate as a complete extinguishment of the Indian title without any other or further act or ceremony whatsoever for the purposes and upon the terms in this Act provided."

Thereafter the Indians, by agreements in writing, ceded all the lands in suit (R. 15, F. 5) upon the terms named in the Act, and the agreements were approved by the President (Op., R. 38).

By said agreements the Indians ceded "all their right, title, and interest" in the lands within the several reservations, which did not affect the title granted by the Act of March 12, 1860 (12 Stat. at L., 3) to the State of Minnesota to the swamp lands within a part of the reservations (*U. S. v. Minn.*, 270 U. S. 181).

(NOTE.—The method of sale afforded opportunity to not only obtain a fair price for the *pine timber and land*, but also the value of *all other* kinds of timber standing thereon, at the time of sale.)

### THE FIRST CLAIM IN SUIT.

The first claim (R. 5-9, Pet. pars. 4-6), is for part of the timber on certain of the ceded lands, alleged to have been appropriated by appellee for its own use, in violation of the express terms of the trust, and without any compensation to appellants therefor. This claim is based upon two subsequent Acts of Congress appropriating a part of the trust property for forestry purposes without the consent of appellants and without any compensation for a part of the timber taken.

*Act of June 27, 1902.*

(32 Stat. L., 400; Finding 7, R. 16-17.)

• By the Act of June 27, 1902, appellee, in disregard of its duties and obligations under the express trust, and without

the consent of appellants, amended sections 4, 5, and 7 of the Act of January 14, 1889, and thereafter administered the trust property as though the amendments were a part of the original Act of January 14, 1889, under which the cessions were made. The amendments to sections 4 and 7 are not here material. Section 5 was amended in the following material respects: (1) the merchantable pine timber on the lands classified as "pine lands" was to be cut and sold separate from the land; (2) appellee's Forester was directed to select 200,000 acres of the ceded lands classified as "pine lands", situate on certain defined reservations, which land, when so selected, was to be thereafter described as "forestry lands", and five per cent of the pine timber on the "forestry lands" when so selected, together with all the land, was to be permanently reserved; (3) in addition to the 200,000 acres to be reserved as "forestry lands", all lands and *all timber* thereon on the islands in Cass and Leech Lakes, not less than 160 acres at the extremity of Sugar Point on Leech Lake, the peninsula known as Pine Point, containing approximately 7,000 acres, and ten sections, all theretofore classified as "pine lands", were permanently withdrawn, and were to be thereafter known as "forestry lands"; (4) when the *merchantable pine* timber on any tract classified as "pine lands" and not reserved as "forestry lands", was removed, the tract (40 acres) was to be opened to homestead entry and disposed of at \$1.25 per acre; (5) when ninety-five per cent of all the merchantable pine timber on any tract reserved for forestry purposes, except the ten sections, islands and points, was removed, such tract was declared to "without further act, resolution or proclamation, forthwith become and be a part of the forest reserve, the same as though set apart by proclamation of the President, in accordance with the act of Congress approved March 3, 1891, and subsequent laws amending and supplementing the same, and



shall be managed and protected in accordance with the provisions and rules and regulations made and to be made in furtherance thereof."

(Note.—Although Appellee had agreed that the lands and all timber so appropriated should be sold for the benefit of the Indians, this Act (June 27, 1922) made no provision for ascertainment of values nor payment for the lands and timber thereon to be included in the Forest Reserve.)

*Act of May 23, 1908.*

(35 Stat. L. 268; Finding 8, R. 17-20.)

By the Act of May 23, 1908, appellee, in further disregard of its duties and obligations under the express trust, and without the consent of appellants, amended sections 4 and 5 of the Act of January 14, 1889, and thereafter administered the trust property as though the amendments were a part of the original Act of January 14, 1889, under which the cessions, were made. The first sentence of this Act (35 Stat. L. 268), is as follows:

"That there is hereby created in the State of Minnesota a National Forest consisting of *lands and territory described as follows, to-wit:*" (Italics ours).

Then follows a detailed description of the exterior boundaries of 312,659.42 acres of land (R. 21-2, F. 10). The area so described included part of the 200,000 acres authorized by the Act of June 27, 1902 to be selected by appellee's Forester, and all of the ten sections, peninsulas, islands and points specifically referred to in that Act. Provision was made for the permanent reservation from sale of the five per cent of the timber reserved by the Act of June 27, 1902; for the further reservation of ten per cent of the "merchantable pine timber" remaining on the uncut portions of the reserved lands outside of the ten sections, islands



and points; and for the sale, from time to time, of so much of the timber on the ten sections, islands and points, as the Forester might deem advisable in the conduct of the National Forest, *provided* that a commission of three persons should "at once" be appointed, consisting of one person to be designated by the President, one by the Secretary of the Interior and one by a general council of the Indians from four reservations therein named. This proviso further directed the commission to "proceed forthwith" to appraise the value of the five per cent of *merchantable pine* timber reserved under the Act of June 27, 1902; the ten per cent of *merchantable pine* reserved under "this Act", and *all* the timber upon the ten sections, islands and points, and to add to the value of said timber an amount equal to \$1.25 for each and every acre of land directed by "this Act" to be included in the reserve, and to certify their findings to the Secretary of the Interior. The Indians at the council, heretofore referred to, were authorized to select a representative, to serve without compensation, who was authorized, within sixty days after the commission certified its findings to the Secretary, to appeal therefrom to the President. The President was authorized to approve or modify the Commission's findings and his decision was made final, and the amount approved by him was directed to be certified by the Secretary of the Interior to the Secretary of the Treasury, and placed to the credit of all the Chippewa Indians in the State of Minnesota, in their trust fund, to draw interest at the rate of five per cent per annum as provided in the Act of January 14, 1889.

Section 5, (R. 19-20, F. 8) provided (*italics ours*):

"That all moneys received from the sale of timber from any of the land set aside by this act for a National Forest, *prior to the appraisal herein provided for* . . . shall be placed to the credit of the

9

Chippewa Indians in the State of Minnesota as provided for in . . . the Act of January 14, 1899 . . . and after said appraisal the National Forest hereby created, as above described, shall be subject to all general laws and regulations from time to time governing national forests, so far as said laws and regulations may be applicable thereto."

Section 6 (R. 20, F. 8), provided compensation to each commissioner at the rate of \$10.00 per day for every day actually spent upon the work, and then declared that "no commissioner shall be paid for more than 10 days' service."

(NOTE.—This Act made no provision for payment for any timber, other than "merchantable pine" (10 inches or over in diameter), standing on any of the ceded lands, to be included in the forest reserve, except timber on the ten sections, islands and points.)

#### *Administration of 1908 Act.*

The commission authorized in section 2 of the Act of May 23, 1908, to be "at once" appointed, was not appointed until December 18, 1922, or nearly fifteen years after the Act became operative. The first administrative step in its execution was an opinion, in writing, dated January 19, 1922, by the Solicitor for the Department of Agriculture, in which he held that payment could only be made for the lands and timber reserved under the 1902 and 1908 acts, as provided in the latter act; that under said Act, all timber of value on the ten sections, islands and points, should be taken into consideration and appraised "*at its value as of the time of the appraisal*"; that only the five and ten per cent of the merchantable pine reserved on the remaining ceded lands, included in the forest reserve were to be appraised, and the value thereof should be that "*existing at the time of the appraisal*." This opinion was approved

by the Solicitor for the Department of the Interior (R. 20, F. 9).

Thereafter, the Commissioner of Indian Affairs, evidently realizing that the *commission* authorized to be appointed by section 2 of the Act of May 23, 1908, could not complete the work of appraisal within the ten days limitation fixed in section 6 of the Act, on July 29, 1922 (R. 20, F. 9) appointed a *committee*, consisting of a representative of the Indian Office, a representative of the Forestry Service and a Chippewa Indian, to make a preliminary investigation of the claims "both legal and equitable" of appellants against appellee for the land and timber "authorized to be taken by the Act of May 23, 1908." This committee was particularly instructed (R. 21, F. 9) to:

"1. Ascertain the exact forest area or acres of land to be paid, for at \$1.25 per acre.

"2. Ascertain the value of the timber reserved from cutting upon lands designated as "the Ten Sections", islands and points.

"3. Ascertain the value of the so-called five per cent of timber left standing for reforestation purposes under the Act of June 27, 1902 (32 Stat. 400), and of the ten per cent of timber retained for reforestation under the Act of May 23, 1908 (35 Stat. 268).

"4. *Ascertain the value of the jack pine and hard-wood timber and the white and Norway pine below ten inches in diameter for which the Indians by opinion of January 19, 1922, rendered by the Solicitor for the Department of Agriculture and concurred in by the Solicitor for the Department of the Interior, are not entitled to compensation under the law—Act of May 23, 1908.*" (Italics ours).

The committee made the preliminary investigation and appraisals as directed and on November 17, 1922, filed its written report (R. 21, F. 9).



Thereafter, and on December 18, 1922, the identical three persons who made the preliminary investigation were regularly appointed members of a commission to carry out the provisions of the Act of May 23, 1908 (R. 21, F. 10). The commission, as such, made no investigation in the field, and used as a basis for its report and award, the report of the committee, and under date of January 16, 1923, submitted its written report and award (R. 21, F. 10). In appraising the five and 10 percent of the reserved timber, the commission disregarded the instructions of the Solicitors of the departments of Agriculture and Interior, and adopted as its estimate as to quantity, the estimates made at the time the timber was reserved, and adopted, for the purposes of valuation, the prices at which the ninety-five and ninety percent of the timber cut from the same lands had previously been sold, for the reasons set out in the report of the preliminary committee, as follows:

"In this connection, the Solicitor of the Department of Agriculture was asked whether the commission in appraising the value of the five and ten per cent timber should use the basis of value prevailing; (a) at the time the commingled timber was sold; (b) at the time the Act of May 22, 1908, became effective; or (c) at the time the appraisal was made. He held, and the Solicitor of the Department of the Interior concurred in his opinion, that the value should be that existing at the date of appraisal. Both Solicitors felt that such an arrangement was most equitable to the Indians. Unfortunately, the contrary is the case. The value of timber is largely influenced by the cost of logging it and logging costs depend upon the quantity of timber available to carry costs of operation. With 90 or 95 per cent of the stand removed in the initial operation, the remainder is too small in quantity to permit profitable operation except in favored localities. As a result its value had depreciated, notwithstanding the fact that stumpage prices in general may have appre-



ciably advanced. This is the case with reference to the major part of the timber reserved under the Acts of 1902 and 1908.

"Furthermore, approximately one-fourth of the reserved timber no longer exists as it was destroyed by fire, disease, insect-infestation, and particularly wind-fall conditions which the Forest Service could not control. It is therefore not susceptible of appraisal at this time. A part of this timber has been disposed of by salvage sales, the receipts therefrom amounting to \$23,827.49, being deposited to the credit of the Indians. The remainder of the timber has decayed due to lack of means of utilization.

"In consideration of the conditions enumerated, the Commission feels that the only form of settlement equitable to the Indians is to determine the value of the reserved timber by multiplying the volume reserved on each section by the price per M. ft. B. M. at which the commingled timber was sold by the General Land Office . . . ."

(NOTE.—The report of the preliminary committee does not appear in the record. The record (R. 23, F. 11), does contain this statement, appearing in that part of the report of the commission dealing with "equities":

"These equitable considerations, *which are fully set out in the report of the preliminary committee*, are here briefly discussed as follows:" (Italics ours.)

The commission's report does not make clear that the Commission disregarded the instructions of the two Solicitors in valuing the five and ten percent of the reserved timber, nor does it set forth the reasons therefor. To clear this up, counsel for Appellants have gone outside of the record before this court, and in the absence of any denial on the part of counsel for Appellee, of the correctness of

the above quotation taken from the record in the court below, this court is requested to accept the same as though it were a part of the record here.

The Commission, (R. 21-2 F. 10) in its award, correctly found:

(1) That the exterior boundaries of the National Forest as defined in the 1908 Act, embraced a total of 312,659.42 acres;

(2) The acreage of the lands within the defined exterior boundaries of the forest reserve (exclusive of the allotted lands and townsites, and excluding also the State swamp land selections) as 190,944.93 acres; and its value, at \$1.25 per acre, as \$238,681.16;

(3) The value, *as of the date of the appraisal* (November 1922), of *all* timber on the ten sections, islands and points, as \$914,830.09; and

(4) The value of the five and ten percent of pine timber reserved under the Acts of 1902 and 1908, based upon the estimates as to *quantity* made at the times the timber was reserved, and the *prices* at which the ninety and ninety-five percent of the timber cut was sold from the same land, as \$336,684.33. The total of items (2), (3), and (4) resulted in a total award of \$1,490,195.58.

From the above award, the authorized representative of the Indians prosecuted an appeal to the President, but on April 9, 1923, the President approved the award, and on May 31, 1923, the amount was placed to the credit of the Indians (R. 22, 23, F. 10).

The Commission in its report, (R. 23-24 F. 11) stated that the values of the lands and timber included in its award,

"meet the legal requirements of the Act of May 23, 1908, but exclude equitable considerations in that they

make no provision for payment of the value of the white and the Norway pine below 10 inches in diameter or for any jack pine and hardwoods standing on lands other than the ten sections, islands, and points. . . . These equitable considerations which are fully set out in the report of the preliminary committee are here briefly discussed as follows:

"In his opinion of January 19, 1922, the Solicitor for the Department of Agriculture held that the use of the term 'merchantable pine timber' in relation to lands other than the ten sections, islands, and points, showed a clear intention on the part of Congress to allow the Indians compensation only for timber reserved from cutting which was merchantable at the time of the passage of the said Act of 1908. Since the preponderance of evidence was to the effect that the white and Norway pine under 10 inches in diameter, and jack pine and hardwoods of all diameters was not commonly regarded as merchantable in 1908, it was the belief of the said Solicitor that no allowance should be made for such classes of timber in determining the amounts to be paid to the Indians. The Solicitor of the Department of the Interior concurred in this view. Because of these opinions the Commission in determining the amounts due the Indians excluded from their appraisal all such timber standing upon lands cut over under the Acts of 1902 and 1908.

"The Commission finds, however, that these classes of timber now possess well-defined and considerable commercial value, which as a matter of equity should be recognized by the Government; and, therefore, recommends that Congress be asked to enact legislation authorizing the appraisal of said timber and proper payment to the Indians therefor . . . ." (R. — F. 11).

"The volume and the exact value of such timber have not been determined by careful estimate and appraisal; but superficial estimates and appraisals conducted jointly by representatives of the Indian Service and of the Forest Service during the fall of 1922, resulted in finding the value thereof to be approximately \$1,060,887.70."



The fair value of the timber, other than "merchantable pine", standing upon that part of the 190,944.93 acres outside of the 10 sections, islands and points, at the time the appraisal was made, for which appellants have received no consideration, is \$1,060,887.70 (R. 27, F. 14). This constitutes the first claim in suit.

Four other claims found by the Commission to be equitable, and their payment by direct appropriation by Congress recommended (R. 23-5, F. 11; Op. p. 40-1) were for, (1) the value of mature pine timber on 18 parcels of "pine land" that remained uncut and unsold, *computed as of the date of the appraisal*; (2) the value of merchantable pine timber on lands erroneously classified as "agricultural lands", *computed as of the date of the appraisal*; (3) interest from January 1, 1909 to January 1, 1923 on (a) the value of the five and ten percent of the reserved timber, computed as to quantity from the estimates made at the time the timber was reserved, and as to value at the prices at which the 95 and 90 percent of the remaining timber was cut from the same lands and sold, and (b) the value of the land, based upon the arbitrary price of \$1.25 per acre fixed in the Act. The reasons given by the Commission for recommending as equitable claims the allowance of interest on the two items above enumerated are stated in its report (R. 24, F. 11) as follows:

"Had the settlement authorized by the act of 1908 been made promptly as the law required, the money due the Indians for the lands within the forest—190,914.93 acres at \$1.25 per acre—amounting to \$238,681.16, and for the five and ten per cent reserved seed trees of white and Norway pine amounting to \$336,684.33, would have been credited to them on the books of the Treasury, and would have begun to draw interest at the rate of five per cent per annum—probably not later than January 1, 1909. The Indians to date have lost 14 years



interest or the equivalent of seventy per cent of the value which would have been found in 1908."

*"All equities, aggregating \$422,929.01, found by the commission, save and except the one in suit in the first claim, were later recognized by Congress and paid by direct appropriation (R. 25-26, F. 12).*

December 5, 1923, a bill was introduced in the House of Representatives entitled "A Bill to compensate the Chippewa Indians of Minnesota for certain equities claimed by them in connection with the settlement for the Minnesota National Forest", and authorizing an appropriation out of the Public Treasury of \$1,060,837.70, designed to carry out the recommendation of the preliminary committee, adopted by the commission (R. 24, F. 11), wherein it was recommended that Congress be asked to enact legislation authorizing the appraisal of all merchantable timber on all lands classified as pine lands other than the ten sections, islands and points, and the five and ten per cent reserved under the Acts of 1902 and 1908, for which the commission was unable, under the terms of the Act of May 23, 1908, to award compensation. The bill was considered by a sub-committee of the House Committee on Indian Affairs, before whom an attorney representing appellants appeared and objected on behalf of appellants to the enactment of the bill into law, if it was designed and intended as a complete settlement of all claims the Indians had against the United States for the lands and timber included in the National Forest, and requested that this claim, together with all other claims of the Indians, be referred to the Court of Claims for judicial determination. No action was taken by the committee or Congress on the bill, and thereafter Congress enacted, and the President approved on May 14, 1926, the jurisdictional act under which this claim is being prosecuted (R. 26-7, F. 13).

## FACTS UPON WHICH SECOND CLAIM IS ASSERTED.

Prior to the adoption of the Act of January 14, 1889, appellee had assumed to survey and establish the boundaries of the reservations in Minnesota occupied by the Chippewa Indians of that State. In making the surveys and establishing the boundaries prescribed by treaties, errors occurred, as a result of which there were wrongfully excluded from the Indian Reservations as established by prior treaties, a total of 16,365.80 acres of land, which land appellee, in consequence of said errors in the surveys and prior to January 14, 1889, disposed of under the public land laws, without any consideration to the Indians. The Indian title to all lands within the true boundaries of said Indian Reservations was ceded to appellee by the agreements entered into under the Act of January 14, 1889, including said 16,365.80 acres. By reason of the cession of the title to these lands by the agreements made under the Act of January 14, 1889, appellee agreed to dispose of these lands for the benefit of the Indians, which it was unable to do by reason of prior disposal, the fair and reasonable value of the lands being \$1.25 per acre (Pet. par. 7, R. 9, F. 15, R. 26-7).

### Assignments of Error.

From the judgment of the Court of Claims, appellants prosecuted this appeal, assigning the following error (R. —):

#### I.

In holding that the appropriation by defendant of all lands and the timber embraced in the National Forest of Minnesota (which included the timber in suit in the first claim), was effected by the Act of May 23, 1908, and as of the date of said Act, and not as of the date when the timber

was appraised, the appraisal approved by the President on April 9, 1923, and payment made.

## II.

In holding that the amount to which plaintiffs were entitled on account of the creation of the Minnesota National Forest was to be determined by the value of the property taken as of the date of the Act of May 23, 1908, and that in consequence plaintiffs were not entitled to recover for white and Norway pine under ten inches in diameter, jackpine and hardwoods standing and growing on the lands taken, and which at the date of the approval of the appraisal by the President were of the fair value of \$1,060,887.70.

## III.

In holding with reference to the second claim in suit that plaintiffs did not allege in their amended petition that the claim arose or grew out of the Act of January 14, 1889, and, further was not within the claims submitted to the court for determination by the jurisdictional act of May 14, 1926.

## IV.

In holding as a conclusion of law that plaintiffs were not entitled to recover on either claim, and directing that plaintiffs' petition be dismissed.

## V.

In entering judgment dismissing plaintiffs' petition.

### Questions for Decision.

Three questions are here presented for decision:

- (1) Did the Act of May 23, 1908 appropriate, or take, all, or any part, of the lands described in section 1 of said Act,

and timber thereon, including the timber embraced in the first claim, as of the date of said Act, or as of the date the timber was appraised by the commission appointed under the Act?

(2) Are appellants entitled to payment for the timber in suit as of its value on May 23, 1908, or as of its value when the timber was appraised by the commission appointed under the Act of May 23, 1908?

(3) Is the second claim sufficiently alleged in the amended petition and did it arise or grow out of the Act of January 14, 1889?

### Summary of Argument.

Affirmance or reversal of the judgment appealed from, so far as it relates to the first claim in suit, depends upon the correct construction of the Act of May 23, 1908 (35 Stat. at L., 268; R. 17-20, F. 8; *infra*, pp. 21-9). The property in suit was the property of Appellants held by Appellee under an express trust. The 1908 Act directed its acquisition for inclusion in a national forest. The court below held that the 1908 Act operated as an immediate appropriation, or taking, basing its conclusion (R. 42-4) upon the first sentence of Section 1, detached words or clauses appearing in Section 5, and an inference drawn by the court from a Congressional appropriation (*infra*, pp. 25-8), and failed to give effect to the obvious intent of Congress drawn from the entire Act, prior related Acts, and Appellee's status as trustee, which we submit, clearly indicated that Congress did not intend that any appropriation, or taking, should occur until the fair value of the property was ascertained, determined, and paid, consonant with constitutional requirements (*infra*, pp. 21-5; 29).

The second claim in suit was rejected by the court below on the ground that it was not sufficiently alleged in the



amended petition that the claim arose under, or grew out of, the Act of January 14, 1889 (Op., R. 46-7). The correctness of the ruling of the court below upon this question is to be determined from an examination of the amended petition (R. 2, Pet., para. 7; *infra*, pp.—), which, when liberally construed, clearly sets forth that the claim arose under, and grew out of, the Act of January 14, 1889 (*infra*, pp.—).

### ARGUMENT.

#### First Question.

The first two questions, raised by the first two Assignments of Error, relate to the first claim, which is for the value, as of the date of the appraisal of *all timber*, other than the reserved "merchantable pine", standing on the 190,994.93 acres, exclusive of the ten sections, islands and points, within the boundaries of the National Forest, with interest. The court below found that this timber, on the date of the Act of May 23, 1908, was not "commonly regarded as merchantable at the time of the passage of the Act of 1908", but that its value in November, 1922, and at the time all of Appellants' timber taken under said Act was appraised, was \$1,060,887.70. The date when the actual appropriation occurred is, therefore, important, and brings us to a consideration of the first question, presented by the first Assignment of Error.

Appellee contends that the lands and timber were appropriated by the Act of May 23, 1908, as of the date of said Act. Appellants contend that the appropriation did not occur until the timber was appraised and the appraisal approved by the President.

The court below sustained Appellee's contention, its reasons therefor being set out in its opinion (R. 42-4).

As will be observed from the opinion of the court below, its conclusion is based upon the language appearing in Sec-

tion 1, detached words or clauses appearing in Section 5, and an inference drawn by the Court from a congressional appropriation. We submit that Sections 1 and 5 are to be construed in connection with the whole statute, as well as the Act of January 14, 1889 and the agreements made thereunder, and is to be given such construction as will carry into execution the true intent of Congress (*Helvering v. New York Trust Co.*, 292 U. S. 454 at 464). It should further be given such a construction as will not imperil its validity when it is reasonably open to a construction free from such peril, *Chippewa Indians v. U. S.*, 301 U. S. 368 at 376. With these rules of construction as our guide, we shall proceed to consider the Act.

*Act of May 23, 1908.*

The first section of the Act of May 23, 1908 (35 Stat. at L., 268; R. 17, F. 8), which is abbreviated in the findings, is:

"That there is hereby created in the State of Minnesota a National Forest consisting of lands and territory described as follows, to-wit:"

Then follows a minute description of the exterior boundaries of the National Forest (35 Stat. at L., 268), embracing 312,659.42 acres (R. 21, F. 10).

If there was an instantaneous taking, by Section 1, of any of the lands and timber within the boundaries therein described, then *all land and timber within said boundaries was taken as of the date of the Act*, for the language is all embrative, with no qualification or limitation. Of the total acreage so included, 81,588.05 acres were embraced in State swamp land selections; 39,725.96 acres in individual allotments; and 480 acres in patented townsites, or a total of 121,714.31 acres (R. 22, F. 10).

By Section 3 (R. 19, F. 8) provision was made for the ultimate acquisition of the "allotted lands" within the

boundaries definitely fixed in Section 1 by voluntary relinquishment to be negotiated and secured from the individual allottees. Obviously there was no instantaneous taking of the allotted lands, the title to which could, by the express terms of the Act, only be acquired by voluntary relinquishment.

No provision was contained in the act for the acquisition of the lands embraced in the "townsites" and in the "State swamp land selections" within the boundaries described in Section 1. As to these lands, while the Act evidences an intent for their ultimate acquisition for forestry purposes, it leaves the time and manner of acquisition, assessment of damages and payment, for future consideration; and it cannot be seriously contended that the Act operated as an instantaneous taking of the vested property rights of the State of Minnesota and the owners of the land within the townsites, which would have been beyond the power of Congress.

**NOTE.**—In Finding 10, (R. 21-2) the Court includes the statement that the State swamp land selections, individual Indian allotments, and patented townsites "constituted no part of the National Forest". This Finding is based upon the fact that Appellee has taken no steps to acquire title to any of these lands. This statement was objected to in the request for amended findings, which was denied, and this Court is asked to disregard this portion of Finding 10 as a mere conclusion of law, shown by the 1906 Act to be erroneous.

As to the acquisition by Appellee of Appellants' timber on the ten sections, islands and points, and within the boundaries of the National Forest, Section 2 (R. 18-19, F. 8) expressly provided that *before any of said timber could be cut or sold, the following acts should be performed:*

(a) The appointment of a commission, consisting of three persons, one to be designated by the President, one by the Secretary of the Interior, and one by the Indians;

(b) The appraisal by said commissioners of the 5% of timber reserved under the Act of 1902, the 10% reserved under the Act of 1908, and the timber on the 10 sections, islands and points, to the total of which said commissioners were directed to add an amount equal to \$1.25 "for each and every acre of land not otherwise appropriated which they find covered by the provisions of this Act, and shall certify the same to the Secretary of the Interior"; and

(c) The amount finally determined by the President was placed to Appellants' account in the permanent fund created by the 1889 Act and the agreements.

Section 5 provided:

"That all monies received from the sale of timber from any of the land set aside by this Act for a National Forest, prior to the appraisal herein provided for shall be placed to the credit of the Chippewa Indians in the State of Minnesota as provided for in the Act of January 14, 1889 . . . and after said appraisal the National Forest hereby created, as above described, shall be subject to all general laws and regulations from time to time governing national forests, so far as said laws and regulations may be applicable thereto." (Italics ours.)

While it is apparent from the face of the Act that Congress intended that Appellee should acquire title to the lands and timber within a very limited time after the date of the Act, it is also evident from the proviso to Section 2 and the provisions of Section 5, that Appellee did not intend that any of the lands and timber should be appropriated, or taken, or that title should pass, until Appellee had fully performed and extinguished its duties as trustee, for by the proviso to Section 2, the value of the land was to be fixed



as of the date of the completion of the appraisal of the timber by the Commission, and no timber could be cut and sold from the ten sections, islands and points *until the appraisal and payment were made*; and by Section 5 all monies received from the *sale of all timber on any of the lands "prior to the appraisal"* was directed to be placed to the credit of the Indians, and only *after said appraisal* was the National Forest to become subject to Appellee's general laws and regulations governing national forests. The Presidential determination of the fair value of the timber and land which, under the Act, was final, fixed the date of "appraisal", and the date of appraisal established the date of the appropriation or taking (*U. S. v. North American Transp. & Trading Co.*, 253 U. S. 330, at 333-4).

The provision to Section 2 and the provisions of Section 5 above referred to are wholly inconsistent with an appropriation or taking or assertion of ownership prior to the appraisal and payment.

*Construction of 1908 Act by Appellee's Officers.*

When the Act of May 23, 1908, came before the Solicitor for the Department of Agriculture and the Solicitor for the Department of the Interior, both concurred in the conclusion that *all* timber of value on the ten sections, islands and points should be taken into consideration and appraised "*at its value as of the time of the appraisal*"; that the 5 and 10% of the pine, merchantable in 1908 (R. 23, F. 11) reserved on the remaining lands, should be appraised, and the value thereof should be that "*existing at the time of the appraisal*" (R. 20, F. 9), which of necessity were holdings by both Solicitors that the *taking* would not occur until after *appraisal* and payment. If the Solicitors had viewed the 1908 Act as effecting an immediate taking they would have directed the appraisals to be made as of the date of the Act, *Brooks-Scanlon Corp. v. U. S.*, 265 U. S. at 123).

The Commissioner of Indian Affairs in 1922, following the opinion of the two Solicitors, considered and treated the land and timber to be taken under the 1908 Act as then Appellants' property. This is evident from the letter of the Commissioner of Indian Affairs dated July 29, 1922 (R. 20-3, F. 9) to the preliminary Committee, written in conformity with the duties imposed upon him by law (T. 25, Sec. 2, U. S. C. A.), wherein the Committee was directed to ascertain the value of the identical timber in suit in the first claim, (instruction 4) the Commissioner realizing appellee's liability for its fair value, notwithstanding the Act of 1908 made no provision for its payment.

Here we have the construction of the Act by the Solicitor for the Department of Agriculture, of which the Bureau of Forestry was, and is, a part, concurred in by the Solicitor for the Department of the Interior, having jurisdiction over all Indian lands, and followed by the Officers of the Department of the Interior in the administration of the law. Such administrative construction, even if the 1908 Act is doubtful and ambiguous as to the time of the appropriation, is entitled to great respect (*Edwards v. Darby*, 12 Wheat. 206, at 210), and should not be disregarded except for cogent reasons (*U. S. v. Moore*, 95 U. S. 763).

NOTE.—It is stated in the opinion (R. 423) that the contention of counsel for Appellants in the lower court was "based solely on the provisions of Section 5 of the Act of 1908", which is error. The reasons advanced in the lower court in support of counsels' position there, are the identical reasons advanced in support of their position in this Court.

#### Reasons Given by Court Below for Its Ruling.

The court below (Op., R. 43-4) rests its decision upon (1) the first sentence of Section 1 of the 1908 Act, viz:

"That there is hereby created in the State of Minnesota a National Forest consisting of lands and territory described as follows:"

(2) the italicized part of the following sentence appearing in Section 5, viz:

"That all moneys received from the sale of timber *from any of the lands set aside by this act for a National Forest*, prior to the appraisal herein provided for \* \* \* shall be placed to the credit of the Chippewa Indians in Minnesota \* \* \*; and after said appraisal, the National Forest *hereby created* as above described, shall be subject to all general laws and regulations \* \* \* governing national forests \* \* \*" and,

(3) the subsequent act of Congress providing "for the payment of back interest for a period of 14 years" on the values of the five and ten per cent of the reserved timber and land.

The court below, after quoting Section 5 (R. 43) says:

"We do not think the language of section 5 is susceptible to the construction plaintiffs place upon it. In the first place, the section uses the words, 'the lands set aside by this Act as a national forest,' and also, 'the national forest hereby created'. These words, as well as the words employed in section 1 of the act, 'That there is hereby created in the State of Minnesota a national forest consisting of lands and territory described as follows: \* \* \* are of the present tense and in the absence of other language in the act showing a contrary intent impel the conclusion that it was the intention of Congress to appropriate the lands included in the national forest and the timber growing thereon as of the date of the act May 23, 1908, and not at some subsequent date."

It will be observed that the court below completely overlooked Appellee's trust relation to the property and its duty to Appellants; that it attached no importance to the proviso to Section 2 requiring the value of the land to be fixed as of the date the appraisal of the timber was completed and prohibiting the cutting or sale of the reserved timber until



after its appraisal and payment; that it attached but little or no importance to the provisions of Section 5 requiring the deposit of all monies received from the sale of timber "from any of the lands set aside by this Act for a national forest prior to appraisal" to the credit of Appellants, and the further provision that until the appraisal was made, the general laws applicable to national forests should not apply to the national forest created by that Act; and that it construed the Act as relating solely to the acquisition of Appellants' lands within the defined boundaries, which, we submit, clearly indicated an intent on the part of Congress to fully and faithfully discharge its duties as trustee before any actual taking of the land and timber of its wards should occur.

The court below, following immediately the quotation just before quoted, says (R. 43) (*Italics ours*):

"That this was the intention of Congress was further and, we think, conclusively shown by the fact that Congress provided for the payment of back interest for a period of 14 years *on the 1908 value* of the lands and the reserved merchantable pine. This action of Congress can not be explained or justified on any theory other than that Congress construed the act of May 23, 1908, as having effected an appropriation or taking of plaintiffs' property as of the date of its approval."

No provision was made in the Act referred to for the payment of interest on the 1908 values of either land or timber, as neither was valued as of that date, (*supra*, pp. 9-12). The appropriation (R. 25-6, F. 12) referred to by the Court was in payment of (R. 24-5 F. 11; Op. R. 41), (1) the value of mature pine timber on 18 parcels of "pine lands" that remained uncut and unsold, computed *as of the date of the appraisal*; (2) the value of merchantable pine timber on lands erroneously classified as "agricultural lands", computed *as of the date of the appraisal*; (3) interest from



January 1, 1909 to January 1, 1923 on (a) the value of five and ten percent of the reserved timber, computed as to quantity from the estimates made at the time the timber was reserved, and as to value at the prices at which the 95 and 90 per cent of the remaining timber was cut from the same lands and sold (*supra*, pp. 10-12), and (b) the value of the land based upon the arbitrary price of \$1.25 fixed in the act. The 1908 Act contained no provision for payment of the timber referred to in Items 1 and 2, for which Appellee was plainly liable, and the reasons given by the Commission for recommending the allowance of interest on Item 3, "a and b", are stated in its report (R. 24, F. 11) as follows:

"Had the settlement authorized by the Act of 1908 been made promptly as the law required, the money due the Indians for the lands within the forest—190,944.93 acres at \$1.25 per acre—amounting to \$238,681.16, and for the five and ten per cent reserved seed trees of white and Norway pine amounting to \$336,684.33 would have been credited to them on the books of the Treasury, and would have begun to draw interest at the rate of five per cent per annum—probably not later than January 1, 1909. The Indians to date have lost 14 years interest, or an equivalent of 70 per cent of the value which would have been found in 1908."

The appropriation authorized in the Act of February 2, 1925, and referred to in the opinion of the court below, we submit, was merely a payment for timber taken by Appellee, of the same character as the timber in suit in the first claim, for which no provision for payment was contained in the 1908 Act, and for loss of interest on three items in the award Appellants had sustained solely as the result of Appellee's negligence, which Congress believed, following the recommendation of the Commission, in equity and good conscience, Appellants should be compensated for. The payment had no relation to any claim that the land and

timber had been appropriated, or taken, as of May 23, 1908.

Counsel for Appellants submit that the court below mistakenly construed the Act of 1908 as limited to only Appellants' lands within the boundaries described in Section 1, mistakenly overlooked Appellee's relation as trustee to the land and timber, mistakenly attached undue importance to detached words, or clauses appearing in the Statute, and failed to give proper consideration and attach proper importance to other provisions of the Statute and related Acts, and the interpretation of the Act by the administrative officers, and lastly, drew an erroneous conclusion from the appropriation in payment of interest, as hereinbefore pointed out, all of which contributed to, we believe, the mistaken conclusion that Appellants' lands and timber were taken as of May 23, 1908.

The construction contended for by appellants, we submit, is consonant with constitutional requirements. If Congress had intended that the Act should operate as an instantaneous appropriation, or taking, provision would have been made for the ascertainment of the values of all land and timber within the boundaries defined in Section 1, as of the date of the Act, and interest on the ascertained values from the date of the Act to the date of payment. This would have been necessary to have met the constitutional requirements of just compensation (*Brown v. U. S.*, 263 U. S. 78, at 85, 86). The construction contended for by Appellee and sustained by the court below, imputes to Congress an attempt to take Appellants' property, held by it under an express trust, without the payment of just compensation as required by the Constitution, an imputation, we submit, the record does not justify.

#### **The Second Question.**

The second question presented for decision is, whether appellants are entitled to payment for the timber in suit

as of its value on May 23, 1908, or as of its value when the timber was appraised by the commission appointed under the Act of May 23, 1908? The answer to the first question will control the answer to the second question, as appellants are entitled to only just compensation for the property taken, as of the date it was taken, with interest to date of payment. *Brown v. U. S.*, 263 U. S. 78, at 87-88; *Seaboard Air Line R. Co. v. U. S.*, 261 U. S. 294 at 304; *Monongahela Nav. Co. v. U. S.*, 148 U. S. at 324-8; *Shoshone Tribe v. U. S.*, 290 U. S. 476 at 497.

The court below found that the timber in suit was not commonly regarded as merchantable in 1908 (R. 23, F. 11) but that its value as of 1923 was \$1,060,887.70 (R. 27, F. 14).

### The Third Question.

The third question raised by the third assignment of error (R. 51) is whether the second claim is sufficiently alleged in the amended petition and arose or grew out of the Act of January 14, 1889. The seventh paragraph of the amended petition (R. 9) is as follows:

"7. Prior to the adoption of the Act of January 14, 1889 (25 Stat. 642) the defendant, the United States had assumed to survey and establish the boundaries of the reservations in Minnesota. In the making of such surveys and establishing of such boundaries errors occurred, as a result of which there were wrongfully excluded from the Indian Reservation as the same had been established by prior treaties with the Indians, a total of 16,365.80 acres of lands, which lands the defendant, United States, in consequence of errors aforesaid, and prior to January 14, 1889, had disposed of under its public land laws without any credit to the Indians therefor. All lands within the true boundaries of said Indian reservations were ceded by the Indians to the defendant, United States, by the agreements entered into under said Act of January 14, 1889,



and the United States by said agreements agreed that all said lands including said 16,365.80 acres wrongfully excluded from said reservations and previously disposed of as aforesaid, should be disposed of for the benefit of the Indians under said Act. By reason of said prior disposal said lands were never disposed of for the benefit of the Indians nor has any payment been made on account thereof, the fair and reasonable value of said lands being \$1.25 per acre."

The court below (R. 46) held that appellants "do not allege in their amended petition . . . that the claim arises or grows out of the act of January 14, 1889, or any subsequent act of Congress", and (R. 47) that as its jurisdiction was limited to "legal and equitable claims arising under or growing out of the Act of January 14, 1889, or arising under or growing out of any subsequent act of Congress", it was too clear for argument that this claim was outside of its jurisdiction, however meritorious it otherwise may be.

The allegations of the petition are to be liberally construed and when so construed, we submit, clearly set forth that the Indian title to the 16,365.80 acres was ceded to defendant by the agreements made under the Act of January 14, 1889, and the defendant therein agreed to sell and dispose of all lands, to which it received the Indian title by the agreements of cession, for the benefit of plaintiffs, which it was unable to do by reason of their prior unauthorized disposal by appellee. This allegation clearly brought the claim within the provisions of the jurisdictional act as one arising under or growing out of the Act of January 14, 1889, and states a claim under the jurisdictional act. We respectfully submit that in rejecting this claim on the grounds stated in the petition, the lower court committed reversible error.



**Set-Offs.**

To appellants' two claims asserted in the court below, appellee asserted numerous items of set-off (F's. 16-2, both inclusive), none of which was considered by the court below, and no decision reached thereon, in view of the judgment of the court dismissing appellants' bill (R. 47-8).

If the judgment of the lower court is reversed, the case must be remanded to the lower court for determination of the items of set-off.

**Conclusion.**

Counsel for appellants respectfully submit that for the reasons hereinbefore stated, the court erred in rejecting appellants' first and second claims, in dismissing appellants' bill and entering judgment for appellee, and that the judgment should be reversed and the case remanded for further proceedings in conformity with the order of this Court.

Respectfully submitted,

WEBSTER BALLINGER,  
HOLMES, MAYALL, BRAVILL, AND  
NEIMEYER,

*Counsel for Appellants.*





# INDEX

Contents below.....	1
Introduction.....	1
Questions presented.....	2
Statutes involved.....	3
Argument.....	3
Summary of Argument.....	7
Argument:	
I. The appellants' first claim was correctly dismissed be-	
cause the timber was appropriated for a national	
forest on the effective date of the Act of May 23,	
1908—and not on the date of the approval of the	
appraisal in 1923.....	8
II. Appellants' second claim is not shown to be within the	
scope of the Jurisdictional Act of May 14, 1926.....	17
Conclusion.....	20

## CITATIONS

Cases:	
Becker v. Welkerby, 95 U. S. 517.....	19
Brooks-Sawdon Corp. v. United States, 265 U. S. 106.....	10
Chippewa Indians v. United States, 301 U. S. 368.....	19
Creek Nation v. United States, 302 U. S. 620.....	18, 19
Hurley v. Kincaid, 285 U. S. 98.....	11
Jacobs v. United States, 290 U. S. 13.....	10
Klamath and Modoc Tribes v. United States, 296 U. S. 344.....	19
Lemonick & Co. v. United States, 92 U. S. 733.....	19
Monongahela Navigation Co. v. United States, 148 U. S. 312.....	9
Schilling v. United States, 155 U. S. 163.....	19
Shoshone Tribe v. United States, 290 U. S. 476.....	10, 11, 19
Swift Co. v. United States, 105 U. S. 691.....	16
United States v. Creek Nation, 295 U. S. 103.....	18
United States v. Highsmith, 255 U. S. 170.....	11
United States v. Klamath and Modoc Tribes, 304 U. S. 119.....	9, 10
United States v. Michel, 282 U. S. 656.....	19
United States v. Rogers, 255 U. S. 163.....	9, 11
Treaties and Statutes:	
Treaty of February 22, 1855, 10 Stat. 1165.....	7, 17
Treaty of October 2, 1863, 13 Stat. 667.....	7, 17
Act of January 14, 1889, c. 24, 25 Stat. 642.....	3, 13
Act of June 27, 1902, c. 1157, 32 Stat. 400.....	3, 12, 13
Act of May 23, 1908, c. 193, 35 Stat. 268.....	3, 11, 13
Act of March 3, 1926, c. 44, 44 Stat. 161, 173.....	8
Act of April 11, 1928, c. 357, 45 Stat. 423.....	3
Act of June 18, 1934, c. 568, 48 Stat. 979.....	3
Jurisdictional Act of May 14, 1926, c. 300, 44 Stat. 555.....	3
Miscellaneous:	
42 Cong. Rec. 6427, 6428.....	15
House Report 1563, 60th Cong., 1st Sess.....	14





# **In the Supreme Court of the United States**

**OCTOBER TERM, 1938**

**No. 244**

**THE CHIPPEWA INDIANS OF MINNESOTA, APPELLANTS**

**v.**

**THE UNITED STATES**

**ON APPEAL FROM THE COURT OF CLAIMS**

**BRIEF FOR THE UNITED STATES**

## **OPINION BELOW**

The opinion of the Court of Claims (R. 36-48) is not yet reported.

## **JURISDICTION**

The judgment from which the appeal is taken was entered January 12, 1938 (R. 11). On May 31, 1938, a motion for a new trial by the appellants, filed February 19, 1938, was denied, and a motion for a new trial and request for amendment to the special findings of fact by the appellee, filed March 7, 1938, was allowed in part (R. 11). This appeal was allowed on July 21, 1938 (R. 51). Probable

jurisdiction was noted October 10, 1938. The jurisdiction of this Court is conferred by the Special Jurisdictional Act of June 22, 1936, c. 714, 49 Stat. 1936.

#### QUESTIONS PRESENTED

1. An Act of Congress of May 23, 1906, created a national forest upon lands held by the United States in trust to be sold for the benefit of an Indian tribe and provided for an appraisal of the timber thereon to be approved by the President and for the payment to the Indians of the appraised values. Did the Court of Claims err in holding that a taking of the lands for a public use occurred on the effective date of the Act and not at the time of the subsequent Presidential approval of the appraisal?

2. Certain lands were excluded from the boundaries of an Indian reservation by erroneous surveys in 1872 to 1885 and were disposed of by the United States under the public land laws. Thereafter, pursuant to an Act of Congress of January 14, 1889, lands of the reservation were ceded to the United States in trust to be sold for the benefit of the Indians. The Jurisdictional Act confers jurisdiction on the Court of Claims to adjudicate claims arising under the Act of 1889. In the absence of a showing by the claimant that the United States first learned of the unlawful nature of the disposals after the cessions made pursuant to the Act of 1889, did the Court of Claims err in holding that the

3

Jurisdictional Act did not confer authority to entertain a claim for the value of the lands erroneously excluded and disposed of?

#### STATUTES INVOLVED

The pertinent provisions of the Act of January 14, 1889, c. 24, 25 Stat. 642, providing for cessions of lands to the United States in trust to be disposed of for the benefit of the Indians; the Act of June 27, 1902, c. 1157, 32 Stat. 400, setting aside lands to be selected for a forest reserve; the Act of May 23, 1908, c. 193, 35 Stat. 268, creating and appropriating lands for a national forest and providing for payment therefor; and the Jurisdictional Act of May 14, 1926, c. 900, 44 Stat. 555, as amended by the Acts approved April 11, 1928, c. 357, 45 Stat. 423, and June 18, 1934, c. 568, 48 Stat. 979, are set forth or adequately summarized in the special findings of the court below (R. 12-20) and are referred to in the Argument, *infra*.

#### STATEMENT

This is a suit brought by the Chippewa Indians of Minnesota to recover (a) \$1,060,887.07, with interest from 1923, as the value of certain timber which, it is alleged, was taken by the United States from the Indians, and (b) \$20,457.25, together with interest from March 4, 1890, as the value of 16,365.80 acres of land which, it is alleged, were wrongfully disposed of by the United States prior to January 14, 1889, as a consequence of erroneous surveys of reservation boundaries (R. 8-9).



The Court of Claims held that the timber was appropriated by the Act of May 23, 1908, setting apart the lands involved as a national forest and that the timber had no merchantable value as of that date (R. 44). The court also held that the claim for the value of the lands lost through erroneous surveys, made in 1872 to 1885, did not arise under the Act of January 14, 1889, or any subsequent Act of Congress, as specified in the Jurisdictional Act under which the suit was brought (R. 47). Accordingly, judgment was entered dismissing the petition (R. 11, 48), and the Indians have appealed.

The material facts and statutes essential to an understanding of the case may be summarized as follows:

The Act of January 14, 1889, offered, for the acceptance or rejection of the Minnesota Chippewas, a plan for the cession to the United States of all the lands in their several reservations except those required and reserved to fill allotments on the White Earth and Red Lake reservations (Finding 4, R. 14). The terms of cession required the United States to classify the lands ceded as "pine lands" and "agricultural lands," to sell the "pine lands" at public auction at not less than the value fixed for the pine timber, and to sell the "agricultural lands" under the homestead laws at \$1.25 per acre. The net proceeds were to be placed "in the Treasury of the United States to the credit

of all the Chippewa Indians in the State of Minnesota as a permanent fund" (Finding 6, R. 15). Agreements of cession were thereafter concluded with the Indians (Finding 5, R. 15) and approved by the President on March 4, 1890 (R. 38).

The Act of June 27, 1902, set aside as "forestry lands" 200,000 acres of the several million acres which had been ceded by the Act of 1889, *supra*—the forestry lands to be selected by the Forester of the Department of Agriculture "as soon as practicable." All merchantable pine timber on these lands was to be sold, except 5 percent thereof to be selected by the Forester, which was to be left standing for reforestation.<sup>1</sup> No provision was made for reimbursing the Indians for the 5 percent of the timber or for the 200,000 acres. Land not set aside for forestry purposes was to be opened to homestead entry after the timber had first been sold and removed (Finding 7, R. 16-17).

The Act of May 23, 1908, created a national forest described by metes and bounds, in which was included nearly all of the 200,000 acres reserved in the Act of June 27, 1902. Sale of the "merchantable pine timber," except for the 5 percent of timber

<sup>1</sup> The land and all timber on certain sections, islands, and points were also reserved from sale by this Act, but no claim is made for any timber on these tracts. Therefore, mention of them is omitted, even though they recur frequently in the statutes and record herein coupled with other land. Full compensation for all timber on these tracts was paid to the Indians in 1923 (R. 22-23).

reserved from sale by the Act of June 27, 1902, and 10 percent reserved under this Act for reforestation purposes, was to be continued and all moneys received prior to appraisal placed to the credit of the Indians. The Act provided for the immediate appointment of a Commission to appraise the reforestation timber, and directed the Commission to ascertain the acreage covered by the provisions of the act and to add to the appraised value of the timber an amount equal to \$125 for each acre. Provision was made for crediting to the Indians' permanent fund the amount of the award as finally determined (Finding 8, R. 17-19).

The Commission was not appointed until December 18, 1922 (Finding 9, R. 20). On May 31, 1923, pursuant to the Commission's award, \$1,490,195.38, was credited to the Indians' permanent fund in payment of the land and timber reserved for national forest purposes (Finding 10, R. 22-23). Under an appropriation made by the Act of March 3, 1926, 44 Stat. 173, approximately \$490,000 in addition was thereafter credited to the Indians as interest from 1909 to 1925 upon the amount awarded for the lands and 5 and 10 percent timber reserved (Finding 12, R. 25-26, 41).

*First claim:* The award did not include white and Norway pine less than ten inches in diameter, jack pine, poplar, white birch, yellow birch, oak, basswood, ash, elm, spruce, tamarack, balsam, and cedar, standing upon lands set aside for national forest

purposes of no merchantable value in 1908 but of an estimated value of \$1,060,887.07 in 1922, recovery for which is sought in this suit (Finding 11, R. 23).

*Second claim:* As a result of errors in surveys, 16,265.80 acres of land, which should have been included in the Red Lake Reservation as fixed by the treaties of February 22, 1855, 10 Stat. 1165, and October 2, 1863, 13 Stat. 667, were taken by the United States as public lands and disposed of prior to January 14, 1889, without any consideration therefor to the Indians. The title of the Red Lake bands of Chippewas to their reservation, except certain lands reserved for allotment purposes, was ceded to the United States by agreement pursuant to the Act of January 14, 1889, for the purpose and upon the terms stated therein. In their second claim, appellants seek recovery of the value of the erroneously excluded lands at the rate of \$1.25 per acre (Finding 15, R. 27-28).

#### SUMMARY OF ARGUMENT

I. The court below correctly dismissed appellants' first claim for the value of the timber, since the appropriation of the Indians' beneficial interest therein by the United States was consummated on the effective date of the Act of May 23, 1908, which, *in praesenti*, set aside the Indian lands for a national forest.

Those provisions in the Act upon which appellants rely in no way negative the express intention



of Congress to establish the forest reserve immediately, and afford no tenable basis for their contention that the appropriation of their interest in the property took place upon the approval of the appraisal by the President in 1923.

II. The court below correctly dismissed appellants' claim for the value of the lands erroneously excluded by the surveys made in 1872 to 1885, and disposed of by the United States prior to 1889. By the Jurisdictional Act under which this suit was brought, the court's jurisdiction was limited to claims arising under the Act of January 14, 1889, or any subsequent Act. Since the appellants have failed to show that the United States first learned of the unlawful nature of the disposals after the censuses were made pursuant to the 1889 Act, they have failed to establish the requisite jurisdiction for an adjudication of their claim.

#### ARGUMENT

#### I

THE APPELLANTS' FIRST CLAIM WAS CORRECTLY DISMISSED BECAUSE THE TIMBER WAS APPROPRIATED FOR A NATIONAL FOREST ON THE EFFECTIVE DATE OF THE ACT OF MAY 22, 1908—AND NOT ON THE DATE OF THE APPROVAL OF THE APPRAISAL IN 1923.

The sum awarded by the Commission and that appropriated by the Act of March 3, 1926, 44 Stat. 173, as a result of the Commission's recommendation, totaled, together with interest, \$1,963,240.12 (Findings 10 and 12, R. 22, 26). The appellants

admit (R. 9) that these payments completely discharged the indebtedness found by the Commission to be equitably due them by reason of the creation of the national forest, with the exception of their present claim for the value of the timber here involved which had no merchantable value in 1906, but was reasonably worth \$1,000,887.07 in 1922 (Finding 14, R. 27, 45).

Thus, the crucial question to be determined here is: When did the taking of the timber occur, upon the effective date of the Act of May 23, 1906, or upon the date of the President's approval of the appraisal? Appellants contend that this timber was not taken from them until the President, in 1923, approved the Commission's appraisal, it being their theory that the reservation of the lands for national forest purposes, made in the Act of May 23, 1906, was wholly ineffective until the appraisal was approved.

It is the position of the United States that the immediate effect of the Act of May 23, 1906, was to deprive the appellants of their right to have the timber sold for their benefit since the Act, by its express terms, effectuated a present and immediate creation of a national forest.<sup>2</sup> /

<sup>2</sup> There is no dispute that the appropriation of the timber by the United States, whether it occurred in 1906 or in 1923, was a lawful exercise of the power of eminent domain (*United States v. Klamath and Moadoc Tribes*, 304 U. S. 119); or that compensation is to be determined as of the date of the appropriation. *United States v. Rogers*, 255 U. S. 163; *Nonogahela Navigation Co. v. United States*,

A. THE ACT OF MAY 23, 1908, BY FORFEITING THE SALE OF THE LANDS AND TIMBER, DEPRIVED APPELLANTS OF THEIR BENEFICIAL INTEREST IN THE PROPERTY ON THE DATE OF ITS ENACTMENT.

Legal title to the appellants' lands held in trust by the United States under the Act of January 14, 1889, has always been in the United States, and the sessions pursuant to that Act extinguished the Indian title of use and occupancy. The terms of the trust, however, required that the United States sell the lands and timber for the benefit of appellants, and consequently they retained a beneficial interest therein. This beneficial interest in having the lands and pine timber sold and the proceeds deposited in a permanent fund was a property right subject to appropriation. (Compare *Brooks-Seaton Corp. v. United States*, 265 U. S. 106. It was (except as to the best and merchantable pine timber specifically permitted to be sold) appropriated as a direct and immediate consequence of the Act of May 23, 1908, for because of that Act performance of the trust by the United States was made impossible. In short, it is clear that, from the day the timber was reserved from sale—May 23, 1908—the appellants as *certaini qui trisent* were deprived of their beneficial interest in the timber, i. e., their right to have it sold for their benefit.

148 U. S. 312; see also *Jacobs v. United States*, 290 U. S. 8, 14; *Shoshone Tribe v. United States*, 290 U. S. 476; *United States v. Klamath and Modoc Tribes*, *supra*.

The fact that payment of compensation was long deferred is not material in determining the date of taking, especially since this delay can in no sense be attributed to



That such a consequence was intended is clear, for the language of the Act of May 23, 1908, is susceptible of no other construction than that Congress intended to appropriate the property for national forest purposes forthwith.

Section 1 explicitly provides: "That there is hereby created in the State of Minnesota a national forest consisting of lands and territory described as follows: \* \* \*." In Section 5 are the expressions: "the lands set aside by this Act for a National Forest," and "the National Forest hereby created." These terms speak in the present and plainly show that the national forest came into existence immediately, and, as the court below said (R. 43):

\* \* \* in the absence of other language in the act showing a contrary intent [these words] impel the conclusion that it was the intention of Congress to appropriate the lands included in the national forest and the timber growing thereon as of the date of the act, May 23, 1908, and not at some subsequent date.

Congress and was in fact contrary to its express direction that commissioners be appointed "at once" and proceed "forthwith." Act of May 23, 1908, Sec. 2, 35 Stat. 271. The material and determining factor is that appellants were deprived of their interest in the property, with the exception noted, on the date of the Act of May 23, 1908. This, therefore, was the date of the appropriation. *United States v. Rogers*, 255 U. S. 163, 169; *United States v. Highsmith*, 255 U. S. 170; *Hurley v. Kincaid*, 285 U. S. 95, 103, 104. Cf. *Shoshone Tribe v. United States*, *supra*.



## B. APPELLANTS' INTERPRETATION OF THE ACT IS UNREASONABLE

(1) For language showing a contrary intention appellants rely (Br. 23) upon the provision found in Section 5 of the Act:

\* \* \* and after said appraisal the National Forest hereby created, as above described, shall be subject to all general laws and regulations from time to time governing national forests, so far as said laws and regulations may be applicable thereto.

From this provision appellants argue that the appropriation did not become effective and the lands were not included in the national forest until the appraisal was made.

The words "hereby created" in the quotation itself contradict this argument. But in any event, there is nothing inconsistent in the action of Congress in reserving a large area for national forest purposes in order to conserve the nation's resources and at the same time providing that the laws and regulations which apply to forest reserves generally shall not be applicable until a later date or until some administrative action has been taken. In so doing, the Act of Congress is none the less a reservation in *praesenti*, particularly when, as in this case, the area was already in the custody and protection of the United States and a large portion of it was in the charge of the Forester of the Department of Agriculture. Act of June 27, 1902, c. 1157, § 2, 32 Stat. 400, 403. Moreover, that Congress did not contemplate that any substantial period of time would elapse between the passage of

the Act and the approval of the appraisal is patent from its direction that the appraisers "shall at once be appointed" and "shall proceed forthwith" (Sec. 2).

(2) Appellants also argue (Br. 21, 22) that if there was a taking of any lands and timber by the Act of May 23, 1908, then there must have been a taking of all lands and timber within the boundaries of the national forest as of the date of the Act. To show that no such taking was intended they point out that the Act contains no provision for the acquisition of townsites and state swamp land selections within the forest boundaries and that Section 3 shows that there was no intention to appropriate individual Indian allotments therein. Appellants' premise is clearly unsound. The Act relates predominantly to, and its provisions for awarding compensation relate solely to, the lands and timber held in trust for the Indians. The title, use, and possession of the owners of other lands within the forest were not affected by the Act, for obviously Congress was in no sense attempting to exercise the power of eminent domain over privately owned lands.\*

(3) To sustain their contention that "the date of appraisal established the date of appropriation," the appellants argue (Br. 23, 24): (1) That "the

\*The Act of May 23, 1908, 35 Stat. 268, was proposed as an amendment to the Act of January 14, 1889, and the Act of June 27, 1902. The specific purposes of the Act were: (1) to define exactly the allotment of land and timber of the reserve, (2) to "specifically create such reserve," and (3) to

value of the land was to be fixed as of the date of the completion of the appraisal," (2) that "no timber could be cut and sold from the ten sections, islands and points until the appraisal and payment were made," (3) that "all monies received from the sale of all timber on any of the lands 'prior to the appraisal'" was to be credited to the Indians, and (4) "only after said appraisal was the National Forest to become subject to Appellee's general laws and regulations governing national forests." (See also Br. 26, 27.)

None of these arguments is tenable. (1) Section 2 of the Act itself fixes the value of the land at \$1.25 an acre. (2) Without reference to the date of appraisal, Section 2 of the Act authorizes the make definite and fixed provisions for the appraisal of the land and of the timber to be left standing, all to be placed to the credit of the Indians (House Rept. 1463, 56th Cong., 1st Sess.).

Indeed, Congressman Hackney, a member of the subcommittee of the Committee on Indian Affairs, which investigated this bill, stated on the floor of the House:

"Now, if it were an original proposition to buy land for a forest reserve, there might be a difference of opinion as to the constitutional power of the Government; but here are the Indian lands which were opened to settlement in 1889, and then Congress passed the act of 1902, stopping the settlement and setting apart these lands for forest-reserve purposes. The simple proposition comes up to us now, Shall we pay for what we have got? We have this national forest; it is a forest reserve created by that act; the land is in the possession of the Government, as the act of 1902 provides that from the time of taking over it should thenceforth be a national forest reserve, the same as though created by any other act of Congress or by proclamation. This is a simple process of getting out of a somewhat complicated and unpleasant



Forester from time to time to sell so much of the timber on the sections, islands and points as he may deem advisable. (3) Presumably plaintiff contends that since moneys received from the sale of timber up to the time of appraisal were to be paid directly to the Indians, this indicates that the United States did not appropriate the unsold timber until the date of the appraisal. But clearly this provision simply substitutes actual values where timber had been previously sold in place of a less accurate appraised value that might be made at some later date. The provision plainly had no relevance to the date of the appropriation of the uncut timber. (4) The postp. moment of the appli-

situation there with respect to the Indian rights, on the one hand, and the rights of settlers on the other, and the question of good faith of the Government as well."

As a matter of fact, members of Congress were of the view that the "taking" of the Indians' lands had occurred prior to 1908. Congressman Hackney stated: "The title of this bill is a little misleading. It is not an act creating a national forest. The national forest was created under the Act of June 27, 1902." Congressman Saunders was of the same view:

"This is not an original proposition, as has been stated by the gentleman from Missouri, for the purchase of land for a forest reserve, but it is a sequestration of an Indian reservation for this purpose, and as the Government takes the Indian reservation, as a matter of course, the Government will pay the Indians for the land taken.

"Now, as to the original designation of the land for a forest reserve, that was under the acts heretofore passed by this House, but the formal establishment of the forest reserve is by the act that we are now considering" (42 Cong. Rec. 6427-6428).



action of the laws and regulations governing national forests generally did not operate to defer the appropriation of appellants' interest in the timber in suit, as has been shown *supra*, p. 12.

(4) Finally, appellants urge (Br. 34, 35) that the opinion of the Solicitor of the Department of Agriculture, dated January 20, 1922 (Finding 2, R. 30), and approved by the Solicitor of the Department of the Interior, directing that the reserved timber be appraised as of the time of the appraisal, "were holdings \* \* \* that the taking would not occur until after appraisal and payment." The entire opinion is not in the record, but if this is the legal effect of their interpretation of the Act of May 23, 1906, it is plainly erroneous for, as has been shown, *supra*, the clear intent of Congress was to acquire the property as of the date of the Act, and to have appraisers appointed "at once" who were to proceed "forthwith" to their duties. No intent or consent to pay the value of the property fourteen years later can be inferred. The rule that contemporaneous administrative construction is entitled to great respect is only applicable where there is ambiguity and doubt. *Swift Co. v. United States*, 105 U. S. 691, 695. Here the statute is not ambiguous and the construction not contemporaneous. It is submitted that under such circumstances the administrative construction relied upon here is entitled to very little weight.

The value of the timber for which claim is now made was admittedly \$1,060,887.07 in 1922 (R.

(5). The preponderance of evidence, as the Commission of 1922 found, is that it had no merchantable value in 1908 (R. 29). Since the appropriation occurred May 23, 1908, and the appellants' right to compensation is measured by the value of the property appropriated on that date, it follows that they are entitled to nothing for property which was then of no value, even though it subsequently acquired a value. The Court of Claims, therefore, was correct in dismissing the petition in respect to this claim.

## II

APPELLANTS' SECOND CLAIM IS NOT SHOWN TO BE WITHIN THE SCOPE OF THE JURISDICTIONAL ACT OF MAY 14, 1924

By the treaties of February 22, 1855, 10 Stat. 1455, and October 2, 1863, 13 Stat. 667, the boundaries of the Red Lake Reservation became fixed. Thereafter through errors in surveys made in 1872 to 1885, lands which should have been excluded from the boundaries of the reservation were included, and lands which should have been included were excluded. This resulted in a net loss to the Indians of 16,365.80 acres, for which the appellants claim compensation at the rate of \$1.25 an acre with interest at 5 percent from March 4, 1890, the date on which agreements of cession under the Act of January 14, 1889, were approved by the President.

It may well be that the United States is morally bound to make restitution for the erroneous appro-

petition of these lands, but it is clear, we submit, that the court below was correct in dismissing appellants' second claim for want of jurisdiction.

The Act of May 14, 1924, conferred upon the Court of Claims jurisdiction to determine "all legal and equitable claims arising under or growing out of the Act of January 14, 1909 (Twenty-fifth Statutes at Large, page 849), or arising under or growing out of any subsequent Act of Congress in relation to Indian affairs which said Chippewa Indians of Minnesota may have against the United States". It is not disputed that the 16,365.80 acres of land were disposed of by the United States under the public land laws prior to January 14, 1909.

Under the decisions of this Court in *United States v. Creek Nation*, 295 U. S. 103, 111, and *Creek Nation v. United States*, 302 U. S. 620, the facts of which are strikingly similar to the present case, the taking of appellants' lands was not as of the date of the erroneous surveys but as of the dates of the disposals to third parties, and compensation is to be determined on the basis of the present full equivalent of the value of the lands as of those dates.

It is to be observed that the *Creek Nation* cases clearly recognized that until the erroneous disposals of the lands were confirmed by the United States by realizing the mistake and failing to take steps to remedy it, the Indian title was not extinguished. *United States v. Creek Nation*, 295 U. S. 103, 107,



III; *Creek Nation v. United States*, 302 U. S. 621, 621, 622. See also: *Leavenworth Etc. R. R. Co. v. United States*, 22 U. S. 733; *Becher v. Wetherby*, 25 U. S. 511. If in the present case this confirmation took place after the cession made pursuant to the Act of January 14, 1889, then the title of the Red Lake lands to these lands was ceded to the United States in trust for the appellants. The failure of the United States to take steps to recover the lands and to dispose of them for the benefit of the appellants might give rise to a claim under the Act of January 14, 1889, of which the Court of Claims would have jurisdiction, notwithstanding that the confirmation related back to the dates of disposals. *Creek Nation* cases, *supra*; *Shoshone Tribe v. United States*, *supra*. If, on the other hand, there were an earlier confirmation, the Indian title was thereby extinguished and the claim for compensation could not conceivably arise under the Act of January 14, 1889, or a subsequent Act.\*

The burden is on the appellants to bring themselves within the purview of the jurisdictional Act. *Klamath and Modoc Tribes v. United States*, 296 U. S. 244; *United States v. Michel*, 282 U. S. 656; *Schillinger v. United States*, 155 U. S. 163. As the record stands, it is plain that the disposals

\*In the latter event, the right to any compensation that may be awarded for the taking belongs to the Red Lake lands and not to the appellants, since the former held title when the lands were disposed of and the disposals confirmed. *Chippewa Indians v. United States*, 301 U. S. 348, 372.



were prior to 1863, but there is nothing to show whether they were confirmed by knowledge of their wrongful character and failure to take action before or after the cessions made in that year. The appellants, therefore, have failed to establish jurisdiction to determine this claim.

**CONCLUSION**

It is respectfully submitted that the judgment of the Court of Claims was correct and should be affirmed.

**ROBERT H. JACKSON,**

*Solicitor General.*

**CARL McFARLAND,**

*Assistant Attorney General.*

**RAYMOND T. NAGLE,**

*Special Assistant to the Attorney General.*

**OSCAR PROVOSE,**

**WILLIAM R. SHERWOOD,**

*Attorneys, Department of Justice.*

**November 1933.**











**In the Supreme Court of the United States**

**OCTOBER TERM, 1938**

**No. 244**

**THE CHIPPEWA INDIANS OF MINNESOTA, APPELLANTS**

**v.**

**THE UNITED STATES**

**ON APPEAL FROM THE COURT OF CLAIMS**

**SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES**

The appellants rely upon an unpublished opinion of the Solicitor of the Department of Agriculture, given January 19, 1922, concurred in by the Solicitor of the Department of the Interior, holding that the Commission should value the timber as of the date of the appraisal rather than as of the date of the Act of May 23, 1908. This, they contend, is an administrative construction to the effect that the taking of the Indians' interest in the timber did not occur until the later date (Br. 24-25). This opinion is discussed in the Brief for the United States (p. 16), but the Government also submits the following for the consideration of the Court:

The opinion is not in the record but an examination of it makes it clear that the Solicitor did not at-

attach any significance to the time the beneficial interest was taken. There being no statutory authority by which the Indians could be compensated for the loss of interest after 1908, when the timber should have been appraised and payment made, it is apparent that the Solicitor sought to do equity by directing an appraisal at a later date when values had increased. Nothing in his opinion or the concurring opinion of the Solicitor of the Department of the Interior justifies the appellants' conclusion that they held "that the *taking* would not occur until after appraisal and payment" (Br. 24).

On the contrary, the Solicitor's opinion refers to and does not purport to depart from a prior opinion of Attorney General Gregory to the Secretary of Agriculture (31 Op. Atty. Gen. 95) with reference to the timber here involved and in which it was held that the national forest was created *in praesenti* by the Act of 1908 and that (p. 100):

The provision of section 5 making this forest "subject to all general laws and regulations from time to time governing national forests, so far as said laws and regulations may be applicable," after the appraisal of the timber reserved for forestry purposes, does not postpone the operation of the forestry laws and regulations, except such as relate to the application of the proceeds of timber sales. [Italics supplied.]

Similarly, if the Solicitor's opinion were susceptible of the construction appellants put upon it, it

would then be contrary to the position taken by both the Secretary of the Interior and the Commissioner of Indian Affairs (Hearings before Committee on Indian Affairs, House of Representatives, 68th Cong., 1st Sess., March 1-18, 1924, pp. 11-12), by the appraisal commission in fixing the value (Appellants' Br. 11-12), by the President in approving the Commission's award (R. 22), and by the Act of Congress appropriating interest for about fourteen years prior to the approval of the appraisal (R. 25-26, Act of March 3, 1926, c. 44, 44 Stat. 173).

Moreover, such an interpretation of the Solicitor's opinion is utterly inconsistent with his express holding that the Commission should not include in its appraisal the hardwoods and small pines on the lands upon which stood the 5% and 10% reserved timber and for the value of which the appellants seek recovery in this suit.

Accordingly, it is submitted that appellants' contention that the Solicitor's opinion is an "administrative construction" supporting their interpretation of the Act of May 23, 1908, is without merit.

ROBERT H. JACKSON,  
*Solicitor General.*

CARL MCFARLAND,  
*Assistant Attorney General.*

RAYMOND T. NAGLE,  
*Special Assistant to the Attorney General.*

OSCAR PROVOST,  
*Attorney.*

DECEMBER 1938.



1. The first of these is the fact that the  
 2. second of these is the fact that the  
 3. third of these is the fact that the  
 4. fourth of these is the fact that the  
 5. fifth of these is the fact that the  
 6. sixth of these is the fact that the  
 7. seventh of these is the fact that the  
 8. eighth of these is the fact that the  
 9. ninth of these is the fact that the  
 10. tenth of these is the fact that the

# SUPREME COURT OF THE UNITED STATES.

No. 244.—OCTOBER TERM, 1938.

Chippewa Indians of Minnesota,  
Appellants,  
vs.  
The United States.

} Appeal from the Court of  
Claims.

[January 3, 1939.]

Mr. Justice BLACK delivered the opinion of the Court.

The Chippewa Indians filed suit in the Court of Claims asserting two separate claims against the government. The government pleaded offsets greatly in excess of the claims of the Tribe. Dismissing the Tribe's petition as to both its claims,<sup>1</sup> the Court found it unnecessary to pass upon the government's offsets; and therefore denied them without prejudice. The cause is here on appeal by virtue of a Special Act of Congress requiring our review of the judgment of the Court of Claims.<sup>2</sup>

*As to the first claim.* A Congressional Act of May 23, 1908, created a National Forest upon lands then in possession of the United States but held by the government as a trustee for the benefit of the Chippewa Indian Tribe.<sup>3</sup> This Act authorized the Secretary of the Interior to "proceed with the sale of the merchantable pine timber" upon certain of these lands; and provided for an appraisal "forthwith" of the timber on the lands; for payment to the Indians of the appraised value plus payments received from the sale of any timber by the Secretary of the Interior prior to the appraisal; and for payment to the Tribe of \$1.25 per acre for all of the lands appropriated. Appraisal was not made "forthwith", but in 1922. In 1908, when the Act was passed, certain types of the timber were not "merchantable" and had no value. By 1923, however, when the appraisal was completed and approved, these particular timbers were appraised at \$1,060,887.07. In view of the

<sup>1</sup>—Ct. Cl. —.

<sup>2</sup> 49 Stat. 1826; Act of June 23, 1936, c. 714.

<sup>3</sup> 35 Stat. 268.

long delay in making the appraisal and payment, approximately \$490,000 in interest was appropriated for the benefit of the Tribe in 1926. The Court of Claims construed the 1908 Act as an appropriation of the lands and timber for a public use at the date of enactment, and finding the timbers in question without a merchantable value at that time, decided against the Tribe on this claim.

The sole question raised by appellants' assignment of error with reference to this first claim attacks the Court of Claims' holding—based on its construction of the Act of 1908—that the appropriation of the Tribe's land and timber was effected by that Act and as of the date of the Act, and that court's failure to hold that the appropriation occurred when the timber was appraised and the appraisal approved in April, 1923.

The findings do not show as clearly as might be desired that the timber was without merchantable value in 1908. However, there is a complete absence of any controversy on this point, and appellants were not denied the right to introduce evidence to establish the value of the property. When these findings are considered with the pleadings and are clarified by the opinion of the court below, all possible doubt as to their meaning disappears, and they show that the Court found a lack of any merchantable value in 1908.<sup>4</sup>

Actual appropriation of the land or timber by the United States is admitted. Just compensation for the property appropriated must be its value as of the date when the Tribe's interest in the property was taken.<sup>5</sup> It is agreed that until the passage of the Act of 1908 the government held possession of the land and timber as trustee for the Tribe. Under that trust the government was charged with disposal of the property for the benefit of the Tribe. If the Act of 1908 actually deprived the Tribe of its beneficial interest in the property, the Act represented an exercise of the power of eminent domain and vested—when enacted—complete title in the government. This would be an appropriation—a complete taking of property—at the time the Act became effective.<sup>6</sup>

<sup>4</sup> Cf. *Ackerlind v. United States*, 240 U. S. 531, 535; *Cartas v. United States*, 250 U. S. 545, 546; *American Propeller Co. v. United States*, 300 U. S. 475, 479, 480.

<sup>5</sup> *United States v. Rogers*, 255 U. S. 163, 169; *Shoshone Tribe v. United States*, 299 U. S. 476.

<sup>6</sup> *Harley v. Kincaid*, 285 U. S. 95, 103, 104; *United States v. Lynah*, 188 U. S. 448, 470.

We need look no further than the language of this Act to ascertain its effect. The very first words after the enacting clause are "there is hereby created in the State of Minnesota a National Forest consisting of lands and territories described as follows,

"There follows a description of the lands in question by metes and bounds. Throughout the Act there are repeated declarations referring to the National Forest "hereby created." It would have been difficult for Congress to have selected language more clearly expressing the intent and purpose to deprive the Tribe completely—by the Act—of all its remaining beneficial interest in the property.

Appellants urge that appropriation of the property did not take place until the appraisal of the timber was approved in 1923. In support of this contention they rely chiefly upon the following provisions of Section 6 of the Act: "all monies received

from the sale of timber from any of the land set aside by this Act for a National Forest, prior to the appraisal herein provided for

shall be placed to the credit of the Chippewa Indians in the State of Minnesota . . . and after said appraisal the National Forest hereby created, as above described, shall be subject to all general laws and regulations . . . governing National Forests, . . . " But this provision by its very terms character-

izes the property as "the National Forest hereby created" and directs disposition of "all monies received and the sale of timber from any of the land *set aside by this Act for a National Forest,*

" (italics supplied) The fact that the lands were not to be subjected to the general laws and regulations governing National Forests until after the appraisal was made indicates no congressional intent to delay the creation of the National Park. The government already had legal title to, and possession of the property, and the Act contemplated that the appraisal should be made "forthwith." Since the Tribe was to be paid the appraised value of all the timber, the Act appropriately provided that proceeds for sales of any timber sold before appraisal should be paid to the Tribe.

Upon examination of the Act we are of the opinion that the Court of Claims correctly decided that the appropriation of the land and timber occurred in 1908, when the Act became the law, and that accordingly it properly dismissed the claim.



*Second.* The jurisdictional Act under which the petition in this cause was filed<sup>7</sup> conferred jurisdiction upon the Court of Claims "to hear, examine, and adjudicate and render judgment in any and all legal and equitable claims arising under or growing out of the Act of January 14, 1889 . . . , or arising under or growing out of any subsequent Act of Congress in relation to Indian affairs which said Chippewa Indians of Minnesota may have against the United States, . . ." Appellants' second claim was based upon allegations that the government made erroneous surveys of Indian lands between and including the years 1872 and 1885; that these errors resulted in wrongfully excluding the lands from Indian reservations; and that the government thereafter appropriated and sold these lands (some of which belonged to appellants) before the Act of 1889 was passed. Inspection of the 1889 Act<sup>8</sup> discloses that none of its provisions related to these lands previously disposed of by the government. Its terms were restricted to the Chippewa reservations then existing (1889) in Minnesota. None of the subsequent Acts, relating to Indian affairs, upon which appellants rely<sup>9</sup> expanded the provisions of the 1889 Act so as to include Congressional treatment of the transactions made the basis of this second claim. Since this second claim did not arise from or grow out of the 1889 Act or subsequent Acts, the Court of Claims properly dismissed for want of jurisdiction.

The judgment is

*Affirmed.*

A true copy.

Test:

*Clerk, Supreme Court, U. S.*

<sup>7</sup> 44 Stat. 555, as amended by Acts approved April 11, 1928 (45 Stat. 423) and June 18, 1934 (48 Stat. 979).

<sup>8</sup> 25 Stat. 642 (1889).

<sup>9</sup> 32 Stat. 400 (1902); 35 Stat. 268 (1908).

